Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

GRINNELL CORPORATION,

Petitioner,

v.

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669;
UNITED ASSOCIATION OF THE PLUMBING AND PIPEFITTING
INDUSTRY OF THE UNITED STATES AND CANADA,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in imposing a heightened proof standard for antitrust conspiracy claims at the summary judgment stage that is in direct conflict with the standards adopted by other circuits.

2. Whether the court of appeals erred in holding that the nonstatutory labor exemption from antitrust liability extends to conspiracies between a union and a multi-employer bargaining unit that are designed to reduce competition by raising the costs of a competitor that is not a member of the bargaining unit.

3. Whether the court of appeals erred in holding that predatory intent is an essential element of a claim under Section 1 of the Sherman Act alleging that defendants conspired to maintain prices and lessen competition by dictating their competitors' costs.

LIST OF PARTIES

All of the parties to the proceeding in the court below are listed in the caption.

RULE 29.6 STATEMENT

Petitioner Grinnell Corporation is a wholly owned subsidiary of Tyco International Ltd. Petitioner has no non-wholly owned subsidiaries.

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Petitioner Grinnell Corporation respectfully submits this petition for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is not reported, but the judgment is noted at 133 F.3d 914 (Table). The opinion of the district court (App., *infra*, 7a-47a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1998. A timely petition for rehearing was denied on February 18, 1998. App., *infra*, 48a-49a. On April 27, 1998, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including June 18, 1998. *See* Application No. A-806. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is hereby declared to be illegal."

STATEMENT OF THE CASE

This case raises important questions concerning the appropriate standard for summary judgment in antitrust conspiracy lawsuits and the interaction between the Nation's antitrust and labor laws. The decision below is in conflict with decisions of other courts of appeals that have rejected the notion that a heightened proof standard is applicable to antitrust conspiracy claims at the summary judgment stage. In addition, the court of appeals' application of the nonstatutory labor exemption to bar the antitrust claims at issue in this case is irreconcilable with decisions of this Court and of other circuits. Finally, the decision below is incon-

sistent with precedents holding that specific intent is not an element of a claim under Section 1 of the Sherman Act. A grant of certiorari in this case would provide the Court with an opportunity to resolve these conflicts among the authorities and eliminate the current confusion in the lower courts on these issues of substantial commercial and legal significance.

I. Factual Background

Petitioner Grinnell Corporation is the largest designer, manufacturer, and installer of fire sprinkler systems in the United States. Many of Grinnell's employees are represented for collective bargaining purposes by respondent Road Sprinkler Fitters Local Union No. 669 ("Local 669"), a local union that is affiliated with respondent United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("United Association"). App., *infra*, 9a-10a.

For many years, Grinnell has been a member of the National Fire Sprinkler Association ("NFSA"), a trade association of mostly unionized fire sprinkler contractors. NFSA has traditionally served as a multiemployer bargaining unit in collective bargaining negotiations with Local 669, and in that capacity has negotiated multiemployer collective bargaining agreements on behalf of those contractors who choose to participate in the NFSA bargaining unit. Before 1993, Grinnell was a member of the NFSA bargaining unit. App., *infra*, 9a-10a.

After NFSA had negotiated and agreed to the 1991-94 collective bargaining agreement with Local 669 on behalf of Grinnell and other unionized contractors, increasing competition from non-unionized contractors began to place those unionized contractors at a competitive disadvantage. In response, Local 669 and NFSA entered into a Letter of Understanding establishing a job "targeting" program whereby unionized contractors would be permitted to depart downward from the union wage scale when competing against non-union contractors for particular fire sprinkler

contracting jobs. App., *infra*, 11a & n.3; 4th Cir. Joint Appendix ("JA") 148-49, 629-37. The purpose of the targeting program was to permit unionized contractors to compete against non-unionized contractors in bidding on particular contracting jobs. JA 509, 620-21, 632, 799.

The terms of the Letter of Understanding regarding targeting were agreed to by NFSA and Local 669 at a meeting of the Mutual Cooperation Committee, a group that was established pursuant to the 1991-94 collective bargaining agreement and that included both NFSA and Local 669 officials. JA 148-49, 494-95, 621-27; App., *infra*, 24a. The targeting program was not part of the 1991-94 collective bargaining agreement itself, but instead "bec[a]me operative pursuant to supplemental agreements between the NFSA and the Union [*i.e.*, Local 669]." App., *infra*, 11a.

The November 1991 Letter of Understanding established procedures for the targeting program and provided that the program was "effective through November 30, 1992 and may be extended or modified by mutual agreement thereafter." JA 148-49. The Letter was signed by representatives of both NFSA and Local 669. *Id.* In November 1992, NFSA and Local 669 jointly agreed to extend the targeting program through May 31, 1993. App., *infra*, 11a n.3. Once again, representatives of both NFSA and Local 669 signed a Letter of Understanding to that effect. JA 479.

Targeting was generally made available to all qualified union contractors who requested it on particular jobs where non-union contractors were also bidding for the contract. JA 556-58. Grinnell was the largest benefactor of the targeting program during this period. JA 740-41, 751. A union representative testified that Grinnell had more jobs that benefited from targeting than any other fire sprinkler contractor. JA 740-41, 751.

A. Withdrawal of Job Targeting

In May 1993, Local 669 announced that effective June 1, 1993, it would prohibit contractors from further partici-

pation in the targeting program unless they agreed to remain part of the NFSA bargaining unit or otherwise agreed to be bound by whatever collective bargaining agreement was ultimately negotiated between NFSA and Local 669 for the 1994-97 period. Grinnell declined to agree to those conditions. App., *infra*, 12a.

In July 1993, Local 669 and NFSA met to discuss reinstatement of the targeting program, and ultimately agreed to reinstate that program for all unionized contractors, including Grinnell. JA 157, 516-17. Acting through the Mutual Cooperation Committee, representatives of both NFSA and Local 669 signed a Letter of Understanding that stated: "This Letter of Understanding by action of the Mutual Cooperation Committee will allow job targeting as it was prior to May 31, 1993, and will continue until November 15, 1993." JA 157. NFSA and Local 669 agreed that they would meet again in the future to discuss the targeting program. JA 516-17.

On September 22, 1993, Grinnell informed NFSA and Local 669 that it was withdrawing from the NFSA multiemployer bargaining unit and would bargain independently with Local 669 in upcoming negotiations regarding the 1994-97 period. This decision by Grinnell, the largest contractor in the fire sprinkler industry, threatened to increase competition in the industry by creating the possibility that Grinnell would obtain different and more favorable wage and benefit terms than other unionized contractors, thereby enabling it to underbid its competitors in bidding for contracting jobs. JA 575-76.

NFSA and Local 669 admit that they wanted Grinnell to rejoin the NFSA bargaining unit or otherwise to agree to be bound by the 1994-97 NFSA-Local 669 collective bargaining agreement. NFSA was concerned about its potential loss of bargaining leverage as a result of Grinnell's withdrawal from the NFSA bargaining unit. JA 684. Moreover, NFSA feared that other contractors might follow Grinnell's lead in withdrawing from the NFSA unit if Grinnell succeeded in obtaining a separate collective bar-

gaining agreement with Local 669. JA 781-82. In addition, NFSA sought to maintain a "level playing field" for its members from the standpoint of labor costs. JA 610-11, 698. Thus, NFSA wanted Grinnell to remain a part of the bargaining unit and be subject to the same 1994-97 collective bargaining agreement as all other members of the unit. JA 794.

Similarly, Local 669 was desirous of maintaining a "stable work environment for all contractors to operate in" and "uniform national economic standards" for all unionized contractors, and wanted all of these contractors to be "on an equal footing on a competitive bid basis." JA 576, 582, 773. Local 669 was opposed to any effort by Grinnell to obtain "economic advantages over other contractors" through a separately negotiated collective bargaining agreement. JA 575-76. In fact, in a discussion between representatives of NFSA and Local 669 regarding Grinnell's withdrawal from the NFSA bargaining unit, Local 669's business manager stated that "he would do anything to keep Grinnell a signatory employer" and that "[h]e wanted to cooperate" with NFSA in this regard. JA 682.

Two days after Grinnell's announcement of its decision to withdraw from the NFSA bargaining unit, representatives of NFSA and Local 669 met and discussed Grinnell's withdrawal. JA 675-78. Thereafter, on October 18, 1993, Local 669's business manager issued a letter withdrawing the targeting program from contractors who did not agree to be bound by the 1994-97 NFSA-Local 669 agreement, thereby rescinding the July 1993 Letter of Understanding between NFSA and Local 669. JA 159. Local 669's business manager admitted that he copied NFSA on this letter because "they are involved with it" and "they're on the committee." JA 776.

When a contractor complained to NFSA about this October 18 letter, NFSA explained that it was in NFSA's interest "to *agree with this withdrawal of Targeting* . . . ." JA 797 (emphasis added). Representatives of Local 669 admitted that the purpose of the October 18 withdrawal of

targeting was to coerce contractors like Grinnell into ceding their bargaining rights to NFSA for the 1994-97 agreement. JA 566-67, 788, 799.

The withdrawal of targeting deprived Grinnell of the targeting discount, but that discount remained available to Grinnell's competitors who had agreed to be bound by the 1994-97 NFSA-Local 669 agreement. Thus, those contractors obtained a competitive advantage over Grinnell in bidding on new contracting jobs. JA 559-60.

B. Agreement to Impose Uniform Terms and Conditions

NFSA and Local 669 engaged in negotiations regarding a new 1994-97 collective bargaining agreement from November 1993 until April 8, 1994. App., *infra*, 13a. During these negotiations, NFSA's policy was to seek a "level playing field" for unionized contractors, and NFSA was concerned that Grinnell (which was negotiating separately with Local 669) might obtain a more favorable agreement than NFSA. JA 206, 638-40. Accordingly, NFSA sought to insert a "most favored nations" clause in its agreement with Local 669; that clause would have given members of the NFSA bargaining unit the benefit of any concessions made by Local 669 to Grinnell or any other independent contractor. JA 638-39. NFSA admitted that its concern about Grinnell's independent status was "a reason for proposing the most favored nations clause." JA 643. In particular, NFSA wanted to make sure that the members of its bargaining unit would not be disadvantaged in competing with contractors (like Grinnell) who were not members of the unit. JA 639.

The issue of the "most favored nations" clause was so important to NFSA that none of the members of NFSA's negotiating committee was willing to reach an agreement without the protection afforded by such a clause. JA 700. Local 669 opposed inclusion of the clause in the agreement, however, and assured NFSA that it was unnecessary because "[n]o contractor will get terms that give it an ad-

vantage over another contractor, *including Grinnell*." JA 227 (emphasis added); *see* JA 226 ("They [*i.e.*, Grinnell] will not get a more favorable ag[ree]m[en]t."); JA 246 (NFSA contractors had "no need for" most favored nations clause because Local 669 "[a]lways kept everybody in [the] same game"); JA 590-91 (same). At the final negotiating session between NFSA and Local 669 on April 8, 1994, this issue was resolved and a deal was reached only when Local 669's representative expressly promised NFSA that "[y]ou don't need it [*i.e.*, the most favored nations clause]," stating "We've always worked in good faith. Work w[ith] me on that." JA 253-54; *see* JA 589.

In keeping with the promises made in the NFSA-Local 669 negotiations, Local 669 did not accept Grinnell's efforts to achieve a meaningfully different collective bargaining agreement for Grinnell's employees. JA 579-80. Instead, Local 669 offered "substantially the terms of the NFSA agreement to Grinnell." JA 857. The parties reached an impasse, and Local 669 subsequently commenced a strike against Grinnell.

II. Proceedings in the District Court

In 1994, Grinnell brought this action against respondents in the United States District Court for the District of Maryland, alleging *inter alia* that respondents had violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by engaging in two related anticompetitive conspiracies with NFSA. First, Grinnell alleged that respondents and NFSA conspired in 1993 to withdraw the targeting program discount from Grinnell in order to coerce Grinnell into ceding its collective bargaining authority back to NFSA. Second, Grinnell alleged that during the negotiations leading up to the 1994-97 collective bargaining agreement, respondents and NFSA conspired to prevent Grinnell from obtaining more favorable collective bargaining terms than those obtained by NFSA in its negotiations with respondents, effectively imposing on Grinnell the terms of the NFSA-Local 669 agreement. The alleged purpose of this conspiracy was

to reduce competition in the fire sprinkler industry by establishing a uniform labor cost structure for competing unionized contractors (including Grinnell) who were not members of the NFSA bargaining unit. This conspiracy was alleged to be actionable under this Court's decision in *Amalgamated United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

The district court granted summary judgment for respondents. App., *infra*, 7a-47a. The court first held that in order to survive summary judgment on its antitrust conspiracy claims, Grinnell would have to satisfy the Fourth Circuit's heightened summary judgment standard applicable to such claims. Under that standard, an antitrust plaintiff "must 'bring forth evidence that *excludes the possibility* that the alleged coconspirators acted independently or based on a legitimate business purpose.'" *Id.* at 23a (quoting *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 543 (4th Cir. 1991)) (emphasis added); *see also* App., *infra*, 18a-19a ("'when there is evidence of conduct that is consistent with both legitimate competition and an illegal conspiracy, courts may not infer that an illegal conspiracy has occurred without other evidence'") (quoting *Thompson Everett, Inc. v. National Cable Advert., L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995)).

The district court then concluded that Grinnell had failed to meet this demanding evidentiary burden. App., *infra*, 23a-30a. In so holding, the court expressed the view that under Fourth Circuit law, Grinnell was required to prove as an element of its *Pennington* conspiracy claim that defendants' agreement to impose the terms of the NFSA-Local 669 agreement on Grinnell was intended to "'ruin'" Grinnell or "'drive it out of business.'" *Id.* at 28a (quoting *Smitty Baker Coal Co. v. United Mine Workers*, 620 F.2d 416, 431-32 (4th Cir. 1980)).

The district court next held that Grinnell's antitrust claims were barred by the nonstatutory labor exemption, which immunizes certain union-employer conduct from liability under the antitrust laws in order to effectuate the

goals of federal labor policy. The court concluded without analysis that any conspiracy to withdraw job targeting from Grinnell and other contractors who refused to cede bargaining authority to NFSA "primarily affected the parties themselves, . . . concerned wages, hours and conditions of employment and . . . [was] produced during *bona fide* arms-length collective bargaining between the parties." App., *infra*, 32a. Moreover, the court held that Grinnell's antitrust conspiracy claims required proof "that the Union acted with an improper motive," but that this Court's decision in *Brown v. Pro Football, Inc.*, 116 S. Ct. 2116, 2119 (1996), precluded such a showing because "it is not the role of a court in an antitrust case to examine the motives of the parties to a labor agreement reached during collective bargaining." App., *infra*, 33a.

III. Proceedings in the Court of Appeals

The court of appeals affirmed. App., *infra*, 1a-6a. The court reaffirmed its heightened proof standard for antitrust conspiracy claims challenged at the summary judgment stage, agreeing with the district court that "to survive a summary judgment motion an antitrust plaintiff must . . . 'bring forward evidence that *excludes the possibility* that the alleged co-conspirators acted independently or based on a legitimate business purpose.'" *Id.* at 4a (quoting *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 542-43 (4th Cir. 1991)) (emphasis added); *see also* App., *infra* 4a ("[C]onduct as consistent with permissible competition as with illegal conspiracy, does not, standing alone, support an inference of anti-trust conspiracy.") (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)). Applying that heightened evidentiary standard, the court of appeals concluded that Grinnell's evidence was insufficient to survive summary judgment. App., *infra*, 4a-6a. The court of appeals also adopted and approved the district court's reasoning in holding that Grinnell's antitrust claims were barred by the nonstatutory labor exemption. *Id.*

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE DIVIDED OVER THE QUESTION WHETHER A HEIGHTENED PROOF STANDARD IS APPLICABLE TO ANTITRUST CONSPIRACY CLAIMS

In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), this Court held that entry of summary judgment for the defendants might be appropriate in an antitrust case involving claims of predatory pricing (*i.e.*, allegations that the defendants engaged in a lengthy conspiracy to charge unduly *low* prices in order to drive their competitors out of business). This Court observed that "a predatory pricing conspiracy is by nature speculative" and "generally unlikely to occur" (475 U.S. at 588, 590); that this was "especially so where, as here, the prospects of attaining monopoly power seem so slight" (*id.* at 590); and that "[t]he alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist" (*id.* at 592). Moreover, the Court held that there was no "direct evidence" of such a conspiracy nor any "apparent motive" for defendants to engage in such conduct (*id.* at 595, 597) and that the challenged conduct -- selling products at low prices -- appeared in its face to be "procompetitive" (*id.* at 593).

Given the speculative character of the allegations and the facially procompetitive nature of the challenged conduct at issue, the *Matsushita* Court cautioned that an implausible finding of conspiracy could "chill the very conduct the antitrust laws are designed to protect." *Id.* at 594 (citation omitted). The Court therefore held that "if [defendants] had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." *Id.* at 596-97. The Court remanded the case with instructions to enter summary judgment unless plaintiffs came forward with "sufficiently unambiguous" evidence "*tend[ing]* to exclude the possibility"

of independent action. *Id.* at 597 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)) (emphasis added).

In *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992), this Court made clear that its decision in *Matsushita* was not intended to alter in any way the normal standards for summary judgment or to create a special evidentiary burden to be met by plaintiffs asserting antitrust conspiracy claims. The Court emphasized that *Matsushita* "did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases." 504 U.S. at 468. As the Court explained,

> The [*Matsushita*] Court did not hold that if the moving party enunciates *any* economic theory supporting its behavior . . . it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

Id. at 468-69. By contrast, the *Kodak* Court held, where "[t]he alleged conduct . . . is facially anticompetitive and exactly the harm that antitrust laws aim to prevent . . . *Matsushita* does not create any presumption in favor of summary judgment for the defendant." *Id.* at 478.

Despite this Court's efforts to clarify the *Matsushita* decision in the *Kodak* case more than six years ago, the circuits have grown increasingly divided over the proper interpretation of *Matsushita* and the appropriate standard for assessing motions for summary judgment in antitrust conspiracy cases. This conflict among the circuits shows no signs of diminishing with time, and arises with great frequency in antitrust conspiracy cases.

A. Several Circuits Have Adopted a Broad, All-Encompassing Reading of *Matsushita*

Some circuits, including the court below, have interpreted *Matsushita* and its progeny to mandate dismissal of antitrust conspiracy claims whenever the plaintiff's evidence at the summary judgment stage is consistent with inferences of both conspiracy and innocent conduct. Under this interpretation, *Matsushita*'s rigorous standard applies regardless of the plausibility of the plaintiff's theory or the nature of the alleged misconduct.

The Fourth Circuit has adopted the most rigorous and restrictive version of the *Matsushita* summary judgment standard. Under that standard, which was reaffirmed by the court below, a plaintiff must "bring forward evidence that *excludes the possibility* that the alleged co-conspirators acted independently or based on a legitimate business purpose." App., *infra*, 4a (emphasis added); *accord Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 542-43 (4th Cir. 1991). In effect, and without regard to the inherent plausibility of the alleged conspiracy, the Fourth Circuit requires plaintiffs to submit evidence that unambiguously compels the conclusion that defendants engaged in an illegal conspiracy; doubts and ambiguities are to be resolved against the plaintiff. *Id.*; *see also Thompson Everett, Inc. v. National Cable Advertising, L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995) ("on summary judgment motions in antitrust cases, . . . when there is evidence of conduct that is consistent with both legitimate competition and an illegal conspiracy, courts may not infer that an illegal conspiracy has occurred without other evidence"); *Service & Training, Inc. v. Data General Corp.*, 963 F.2d 680, 685 (4th Cir. 1992) (if defendants' actions are "'as consistent with permissible competition as with illegal conspiracy,' there will be no 'inference of antitrust conspiracy'") (citations omitted); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801, 806 n.4 (4th Cir. 1989) (rejecting views of other courts that interpret *Matsushita* more narrowly because "those decisions

have in effect misconstrued 'tends to exclude the possibility' of independent conduct . . ., to mean something like 'arguably consistent with the possibility of conspiracy.'") (citations omitted).[1]

The Seventh Circuit has also imposed a heightened evidentiary burden on plaintiffs whose antitrust conspiracy claims are challenged at the summary judgment stage. Regardless of whether the defendants had a rational economic motive to conspire, the Seventh Circuit requires antitrust plaintiffs at the summary judgment stage to come forward with evidence that "tends to exclude" the possibility of independent action, *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 48-49 (7th Cir. 1992), and holds that summary judgment is required if a defendant provides a "plausible and justifiable alternative interpretation of its conduct" such that plaintiff's evidence is equally consistent with both independent action and conspiracy. *Id.* at 54-55. Under the Seventh Circuit's standard, therefore, defendants will prevail at the summary judgment stage unless the plaintiff can present evidence that affirmatively refutes the *possibility* of independent action. *See Serfecz v. Jewel Food Stores*, 67 F.3d 591, 600-01, 602 (7th Cir. 1995) (despite the "existence of mutual economic advantage" supporting plausibility of the alleged conspiracy, summary judgment was required because plaintiff presented "no evidence that *precludes the possibility* of inde-

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1 Particularly in view of this long line of Fourth Circuit precedent adhering to a heightened evidentiary burden at the summary judgment stage, the fact that the opinion below is unpublished does not militate against a grant of certiorari. The Fourth Circuit's standard is now so deeply embedded in the law of that circuit that cases applying the heightened standard no longer meet the test for publication. Absent review by this Court, therefore, the Fourth Circuit's erroneous standard will continue to be applied in future unpublished opinions, even though, as demonstrated herein, it cannot be reconciled with the law of other circuits.

pendent action.") (emphasis added), *cert. denied*, 516 U.S. 1159 (1996).[2]

The Eighth Circuit, in *Corner Pocket of Sioux Falls, Inc. v. Video Lottery Tech., Inc.*, 123 F.3d 1107, 1109 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1054 (1998), recently registered its agreement with those courts giving *Matsushita* a broad interpretation. Rejecting the plaintiffs' argument that *Matsushita* was inapplicable "because the conspiracy they allege served defendants' economic interests," the court chose instead to "read *Matsushita* more broadly." *Id.* The court concluded that *Matsushita*'s limitations on the permissible inferences to be drawn from ambiguous evidence justified entry of summary judgment for the defendant. *Id.* at 1112. *See also Lovett v. General Motors Corp.*, 998 F.2d 575, 578, 579 (8th Cir. 1993) (without suggesting that the plaintiff's theory was implausible, the court nonetheless ordered entry of judgment for defendant, explaining that "the range of permissible inferences from ambiguous evidence is limited in a [Sherman Act] section one case" and that where plaintiff's "evidence is as consistent with permissible unilateral conduct on [defendants'] part as it is with illegal conspiracy," this Court's case law

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[2] The Seventh Circuit has not spoken with one voice on this issue, however. In *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1178, 118 S. Ct. 1336, 118 S. Ct. 1337 (1998), the court implied that *Matsushita* is limited to cases in which the plaintiff's theory is implausible. Without attempting to reconcile its analysis with prior cases, the *Brand Name* court stated that the "right rule" is that *Matsushita* renders summary judgment appropriate (despite the presence of some evidence supporting the plaintiff's claim) "if the plaintiff's theory of violation *makes no economic sense*." 123 F.3d at 614 (emphasis added). Because the plaintiffs' theory in that case was "especially plausible," however (*id.*), the court reversed the district court's grant of summary judgment for the defendants.

"does not permit a jury to infer the existence of a conspiracy from ambiguous evidence.").

B. Other Circuits Have Limited the *Matsushita* Standard to a Narrow Category of Cases

In direct contrast with the decisions discussed above, other courts of appeals have rejected a broad interpretation of *Matsushita*, reasoning that *Matsushita* does not impose a heightened summary judgment burden on antitrust plaintiffs generally but is instead addressed to the limited circumstance in which a plaintiff seeks to establish an economically improbable conspiracy involving facially procompetitive conduct. These courts squarely reject the notion, adopted and applied by the court of appeals below, that summary judgment must be entered for the defendants whenever the evidence is equally probative of a conspiracy and of independent action.

In *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir. 1993), for example, the Third Circuit held that "*Matsushita* did not invent a new requirement for an antitrust plaintiff to meet, but merely articulated an established one, *i.e.*, a plaintiff must assert a theory that is plausible." 998 F.2d at 1231. In the Third Circuit's view, the *Matsushita* Court's limitations on the permissible inferences to be drawn from ambiguous evidence simply do not apply outside the circumstances at issue in *Matsushita*, where "the plaintiffs' theory of conspiracy was implausible" and "permitting an inference of antitrust conspiracy in the circumstances 'would have the effect of deterring *significant* procompetitive conduct.'" *Id.* at 1232 (citation omitted). Under this reading of *Matsushita*, "the acceptable inferences which can be drawn from circumstantial evidence vary with the plausibility of the plaintiffs' theory and the dangers associated with such inferences." *Id.* Thus, where "the plaintiff's theory of conspiracy is not implausible" and "the defendants' challenged activities are not procompetitive," "more liberal inferences from the evidence should be permitted than in *Matsushita*."

Id. See also Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1001 (3d Cir. 1994) (describing Third Circuit precedent as holding that "*Matsushita* do[es] not apply when [the] challenged action is overtly anticompetitive").

Similarly, in *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432 (9th Cir. 1990), the Ninth Circuit expressly *declined* to read *Matsushita* as "suggesting that a district court may grant summary judgment to antitrust defendants whenever the court concludes that inferences of conspiracy and inferences of innocent conduct are equally plausible." 906 F.2d at 438. The court explained that permitting entry of summary judgment in those circumstances "would lead to a dramatic judicial encroachment on the province of the jury," because it "would imply that the jury should be permitted to choose an inference of conspiracy *only* if the judge has first decided that he would himself draw that inference." *Id.* Thus, the court concluded that "*Matsushita* . . . can[not] be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct," explaining that "[t]his cannot be what the Court meant in *Matsushita*." *Id.* at 439. Instead, the *Petroleum Products* court held that the *Matsushita* rule is limited to cases in which "an inference of antitrust conspiracy from circumstantial evidence . . . would have the effect of deterring significant procompetitive conduct." *Id.*; *see also id.* at 440; *accord City of Long Beach v. Standard Oil Co. of California*, 46 F.3d 929, 933-34 (9th Cir. 1995).

The Sixth and Eleventh Circuits also appear to agree with this interpretation of the summary judgment standard in antitrust cases. *See, e.g., PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 814 (6th Cir. 1997) (rejecting the notion that "*Matsushita* . . . placed special burdens on antitrust plaintiffs responding to summary judgment challenges"); *Alan's of Atlanta v. Minolta Corp.*, 903 F.2d 1414, 1430 n.22 (11th Cir. 1990) ("*Matsushita* calls for no

. . . deviation from the norm embodied in Fed. R. Civ. P. 56"; instead, *Matsushita* merely "warned courts . . . to be skeptical when presented [with] antitrust allegations that clash with established economic theory" but provides no assistance to defendants where the plaintiff's case does not rest on "irrational inferences").[3]

C. This Court's Review is Necessary to Resolve the Conflict Among the Circuits

The foregoing discussion demonstrates that the courts of appeals are deeply divided over the propriety of applying heightened scrutiny to all antitrust conspiracy claims at the summary judgment stage. Indeed, the Eighth Circuit recently recognized this division of authority in express terms. In the *Corner Pocket* case discussed above, the plaintiffs, "[r]elying primarily on cases from the Third and Ninth Circuits, . . . argue[d] that . . . *Matsushita* does not

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[3] The Second Circuit follows a slightly different approach. In *R.B. Ventures Ltd. v. Shane*, 112 F.3d 54 (2d Cir. 1997), the court expressly rejected the view that *Matsushita* established a heightened standard even for economically "implausible" conspiracy claims, and held instead that "[p]roperly understood, *Matsushita* stands merely for the unexceptional proposition that it is the *factual and legal context* within which a party presents its evidence that determines what are the *reasonable* inferences to be drawn from that evidence." 112 F.3d at 58 (emphasis in original). In the Second Circuit's view, therefore, *Matsushita* did not change the basic standards for summary judgment in antitrust cases in *any* circumstances: "[T]he court must still construe the reasonable inferences in favor of the non-moving party" and "'[i]n evaluating the sufficiency of the nonmoving party's evidence, . . . must still proceed very cautiously.'" *Id.* Moreover, "[i]f reasonable minds could differ as to the import of the evidence [or] 'if . . . there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party *simply cannot obtain a summary judgment*.'" *Id.* at 59 (emphasis added; citation omitted).

apply to this case because the conspiracy they allege served defendants' economic interests." 123 F.3d at 1109. The Eighth Circuit expressly rejected the approach followed by the Third and Ninth Circuits, holding instead that "we are among the majority of courts and commentators who read *Matsushita* more broadly." 123 F.3d at 1109.[4] This recognized and widening circuit conflict demands intervention and resolution by this Court.

It is clear that Grinnell's claims would have survived summary judgment had the court below applied the rule followed by the Third, Sixth, Ninth, and Eleventh Circuits. As discussed *supra* at pp. 3-7, Grinnell offered ample evidence to support the inference that respondents conspired to deprive Grinnell of the targeting program discount and to impose on Grinnell the terms of the 1994-97 NFSA-Local 669 collective bargaining agreement. Without suggesting that Grinnell's claims were economically implausible or involved facially procompetitive conduct by the defendants, the courts below nonetheless applied the Fourth Circuit's heightened evidentiary standard to conclude that Grinnell's evidence was insufficient to survive summary judgment. App., *infra*, 4a-6a, 22a-30a. Accordingly, this case squarely presents the issue that has divided the circuits, and provides an appropriate vehicle for review.

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[4] It is doubtful whether the Eighth Circuit was correct in characterizing its interpretation of *Matsushita* as the "majority" view. In any event, the crucial point is that several circuits are aligned on either side of the issue, and this Court's review is necessary to resolve the conflict.

II. THE INTERPRETATION OF THE NONSTATUTORY ANTITRUST EXEMPTION ADOPTED BY THE COURTS BELOW IS IRRECONCILABLE WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS

There is an inherent tension between "the congressional policy favoring collective bargaining under the [National Labor Relations Act] and the congressional policy favoring free competition in business markets." *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975). In a long line of cases commencing with *Allen Bradley Co. v. Local Union No. 3, IBEW*, 325 U.S. 797 (1945), this Court has sought to accommodate that tension between the labor and antitrust laws by recognizing and charting the contours of a judicially created, nonstatutory labor exemption from antitrust liability. *See generally Amalgamated United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965); *Ramsey v. United Mine Workers*, 401 U.S. 302, 313 (1970); *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (1975). Those decisions make clear that the nonstatutory labor exemption does not extend to union-employer agreements that are aimed at third parties or the commercial market. *See, e.g., Connell*, 421 U.S. at 623, 625; *Pennington*, 381 U.S. at 665-66, 668.

The courts below held that the nonstatutory labor exemption immunized respondents from liability under the antitrust laws for the anticompetitive conspiracies identified by Grinnell. That conclusion, however, rests upon a misinterpretation of the nonstatutory exemption that is irreconcilable with this Court's precedents and with decisions of other courts of appeals.

A. The Decision Below Conflicts With Cases From Other Circuits Holding That the Non-statutory Exemption Does Not Extend to Agreements Aimed Primarily at Third Parties

In *Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir. 1976), the Eight Circuit enunciated the leading test for determining the applicability of the nonstatutory exemption in circumstances analogous to this case. Under the *Mackey* test, the nonstatutory exemption is applicable to a union-employer agreement in restraint of trade if the challenged agreement possesses three necessary elements:

> First, . . . the restraint on trade primarily affects only the parties to the collective bargaining relationship.
>
> Second, . . . the agreement sought to be exempted concerns a mandatory subject of collective bargaining.
>
> Finally, . . . the agreement sought to be exempted is the product of bona fide arm's length bargaining.

543 F.2d at 614. In addition to the Eighth Circuit, the Sixth and Ninth Circuits have explicitly adopted this test. *Phoenix Elec. Co. v. National Elec. Contractors Ass'n*, 81 F.3d 858, 861 (9th Cir. 1996); *In re Detroit Auto Dealers Ass'n*, 955 F.2d 457, 463 (6th Cir. 1992); *Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades Dist. Council*, 817 F.2d 1391 (9th Cir. 1987); *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1197-98 (6th Cir. 1979).[5]

The first prong of the *Mackey* test plainly is not satisfied in this case. As discussed in detail above (*supra* pp. 3-6), NFSA and Local 669 conspired to withdraw the target-

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[5] In addition, district courts in other circuits have applied the *Mackey* test. *See, e.g., Zimmerman v. NFL*, 632 F. Supp. 398 (D.D.C. 1986).

ing program discount from Grinnell in order to raise Grinnell's costs and coerce it to rejoin the NFSA bargaining unit.[6] That conspiracy plainly and primarily affected non-parties to the challenged agreement because it was aimed exclusively at contractors that had not yet agreed to be part of the NFSA bargaining unit for purposes of the new round of negotiations; indeed, Grinnell had already withdrawn from the NFSA unit and had announced its intention to bargain separately with the Union. By holding that the nonstatutory exemption encompasses an agreement which exclusively affects non-parties to the agreement, the decision below is in direct conflict with the circuits that apply the *Mackey* test.[7]

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[6] In a cursory passage, the district court purported to conclude that the withdrawal of the targeting program "would have primarily affected the parties themselves." App., *infra*, 32a. This unexplained and inexplicable comment does not eliminate the conflict with the decisions discussed in the text, because the district court's apparent holding that the entities primarily affected by the agreement to withdraw targeting -- namely, Grinnell and other non-members of the NFSA bargaining unit -- were "parties" to that agreement is directly inconsistent with the *Mackey* analysis, which focuses on "the parties *to the collective bargaining relationship*." 543 F.2d at 614 (emphasis added). Since by definition the only parties affected by the agreement to withdraw job targeting were those who had *not* agreed to be part of the NFSA bargaining unit, the conclusion is inescapable that the conspiracy did not "primarily" affect the parties to the collective bargaining relationship between NFSA and Local 669.

[7] The decision below is also inconsistent with the second prong of the *Mackey* test, which requires proof that "the agreement sought to be exempted concerns a mandatory subject of collective bargaining." 543 F.2d at 614. The agreement by Local 669 and NFSA to withdraw job targeting from Grinnell was intended to affect Grinnell's competitive position in the contract bidding process and was plainly *not* a mandatory subject of collective bargaining between NFSA and Local 669.

Circuits that do not explicitly follow the *Mackey* test in applying the nonstatutory exemption have nonetheless imposed similar requirements. In *Sheet Metal Workers Local Union No. 54, AFL-CIO v. E.F. Etie Sheet Metal Co.*, 1 F.3d 1464 (5th Cir. 1993), for example, the Fifth Circuit made clear that the nonstatutory exemption is inapplicable to agreements that "have some effect on third parties who had no chance to affect the negotiation or implementation of the agreement." *Id.* at 1475. On the facts of that case, the Fifth Circuit found that the nonstatutory exemption was applicable because the agreement at issue had been negotiated while the complaining party was a member of the employer group. *Id.* The Fifth Circuit's approach would have mandated the opposite result in this case, because Grinnell exited the NFSA bargaining unit before respondents agreed with NFSA to withdraw job targeting from Grinnell and other non-members.

B. The Decision Below Conflicts With This Court's Analysis and Holding in *Pennington*

The district court and court of appeals held that the nonstatutory exemption also immunized from liability the second conspiracy alleged by Grinnell, namely, the conspiracy by respondents and NFSA to impose on Grinnell the same terms and conditions agreed to by the conspirators in the 1994-97 NFSA-Local 669 collective bargaining agreement. App., *infra*, 4a-6a, 33a-34a. According to the courts below, this conspiracy fell within the statutory exemption because *Brown v. Pro Football, Inc.*, 116 S. Ct. 2116 (1996), forbids courts to "'attempt to investigate [a bargaining party's] subjective motive'" and "cautioned that courts in an antitrust case should not 'second-guess the parties' bargaining decisions.'" App., *infra*, 34a (quoting *Brown*, 116 S. Ct. at 2125).

On this issue, the decision below is irreconcilable with this Court's decision in *Amalgamated United Mine Workers v. Pennington*, 381 U.S. 657 (1965). The *Pennington* Court held that the nonstatutory exemption was inapplica-

ble to an agreement between a union and a multiemployer bargaining unit providing that the union would demand the same high wages from other employers who were not members of the multiemployer unit. While recognizing that federal labor policy protects the right of a union to "conclude a wage agreement with [a] multi-employer bargaining unit without violating the antitrust laws" (*id.* at 664), the Court held that "there is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions *of other bargaining units* or to attempt to settle these matters for the entire industry." *Id.* at 666 (emphasis added). As the Court explained, "a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units." *Id.* at 665.

As Grinnell asserted in the courts below, respondents' agreement with NFSA to impose substantially the terms of the NFSA-Local 669 collective bargaining agreement on Grinnell is precisely analogous to the agreement that the *Pennington* Court held was not entitled to the protection of the nonstatutory exemption. Just as in *Pennington*, the union in this case agreed with certain employers (the NFSA bargaining unit) "to impose a certain wage scale on other bargaining units [*i.e.*, Grinnell]." 381 U.S. at 665. As a result, *Pennington* compels the conclusion that respondents "forfeit[ed] [their] exemption from the antitrust laws." *Id.* The inconsistency between the decision below and the holding of this Court in *Pennington* on this important question is an appropriate basis for granting certiorari. *See* Sup. Ct. R. 10(c).

The courts below made no effort to harmonize their interpretation of the nonstatutory exemption with this Court's holding and analysis in *Pennington*. Instead, they relied solely on *Brown v. Pro Football*, apparently on the assumption that *Brown* modified or overruled the *Pennington* Court's holding that the nonstatutory exemption does not

extend to agreements to impose particular labor terms and conditions on third parties. For two reasons, that conclusion was erroneous and improper.

First, the courts below erred in their belief that *Brown* controls this case. *Brown* involved a multiemployer bargaining unit's decision to implement certain wage terms on their unionized employees after bargaining to impasse with the union in the collective bargaining process. 116 S. Ct. at 2119. Emphasizing that the employers' challenged conduct "involved a matter that the parties were required to negotiate collectively" and "concerned only the parties to the collective-bargaining relationship," the Court held that the employers' conduct was immune from antitrust liability by virtue of the nonstatutory exemption. *Id.* at 2127. Nothing in *Brown* supports extension of the nonstatutory exemption to the circumstances of this case, where the challenged agreement involved imposition of terms and conditions on a third-party competitor -- plainly not "a matter that the parties were required to negotiate collectively" or that "concerned only the parties to the collective-bargaining relationship."

Second, even if *Brown* did provide some arguable support for the result reached by the lower courts, there would be no justification for the refusal of those courts to follow the holding of this Court in *Pennington*. *Brown* did not purport to overrule *Pennington*, and indeed cited it with approval. *See* 116 S. Ct. at 2120. This Court has repeatedly made clear that the lower federal courts are without power to reject Supreme Court precedents on the ground that they have been undermined by later decisions. *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *Agostini v. Felton*, 117 S. Ct. 1997, 2017 (1997) ("We do not acknowledge . . . that other courts

should conclude our more recent cases have, by implication, overruled an earlier precedent"); *accord Ackerley Communications of the Northwest, Inc. v. Krochalis*, 108 F.3d 1095, 1096 (9th Cir. 1997) ("it is not for us to overrule Supreme Court authority that is squarely on point"). Accordingly, any alleged inconsistency between this Court's decisions in *Brown* and *Pennington* (*see, e.g.*, *Brown*, 116 S. Ct. at 2132 (Stevens, J., dissenting)), is a matter solely for this Court, and not the courts below, to resolve. Review is therefore warranted for this reason as well.

III. THE FOURTH CIRCUIT'S ADOPTION OF A PREDATORY INTENT REQUIREMENT FOR *PENNINGTON* CLAIMS IS INCONSISTENT WITH PRECEDENTS OF THIS AND OTHER COURTS

The courts below held that any conspiracy by respondents and NFSA to limit competition by imposing particular collective bargaining terms on Grinnell could not violate the antitrust laws in the absence of proof that the conspiracy was motivated by a specific predatory intent to "'ruin'" Grinnell or "'drive it out of business.'" App., *infra*, 28a. That conclusion followed directly from the Fourth Circuit's prior decision in *Smitty Baker Coal Co. v. United Mine Workers*, 620 F.2d 416 (4th Cir. 1980), which expressly held that predatory intent is an element of an antitrust conspiracy claim under Section 1 of the Sherman Act where the conspiracy at issue is a union-employer agreement to impose particular terms and conditions on third-party competitors of the defendant employers. *See* 620 F.2d at 430 ("there must be the anticompetitive purpose to 'ruin' the small marginal competitors in order to establish an antitrust violation in the *Pennington*-type situation"); *id.* at 432-33 (holding that an essential element of a *Pennington* claim is proof of "intent to drive these marginal operators out of

business"). A handful of other courts have reached similar conclusions.[8]

By contrast, this Court and numerous other courts of appeals have held that predatory intent is *not* required in order to prove a violation of Section 1 of the Sherman Act. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978) (noting "the general rule that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect"); *United States v. Griffith*, 334 U.S. 100, 105 (1948) ("It is sufficient that a restraint of trade . . . results as the consequence of the defendant's conduct or business arrangement."), *overruled on other grounds*, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *Levine v. Central Florida Med. Affiliates*, 72 F.3d 1538, 1552 (11th Cir.) ("The rule of reason analysis is concerned with the actual or likely effects of defendants' behavior, not with the intent behind that behavior."), *cert. denied*, 117 S. Ct. 75 (1996); *Association for Intercollegiate Athletics for Women v. N.C.A.A.*, 735 F.2d 577, 583 (D.C. Cir. 1984) ("We reject the district court's position that intent is a separate and essential prerequisite to civil antitrust liability . . . ."); *Bank of Utah v. Commercial Security Bank*, 369 F.2d 19, 26 (10th Cir.

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[8] Relying on a concurring opinion (rather than the opinion for the Court) in the *Pennington* case, the Fifth, Sixth and Seventh Circuits have likewise held that substantive claims under *Pennington* require a showing of predatory intent to drive the competitor out of business. *James R. Snyder Co. v. Associated Gen. Contractors of Am.*, 677 F.2d 1111, 1120 (6th Cir. 1982); *Mid-Am. Regional Bargaining Ass'n v. Will County Carpenters Dist. Council*, 675 F.2d 881, 888 (7th Cir. 1982); *Embry Riddle Aeronautical Univ. v. Ross Aviation, Inc.*, 504 F.2d 896, 903 (5th Cir. 1974); *Associated Milk Dealers, Inc. v. Milk Drivers Union*, 422 F.2d 546, 554 (7th Cir. 1970).

1966) ("[I]ntent to restrain trade is not essential to violation of Section 1 of the [Sherman] Act . . . .").[9]

This Court has never specifically addressed the clear tension between the predatory intent requirement imposed by the Fourth Circuit and other courts in *Pennington*-type claims, on the one hand, and the firmly established principle that predatory intent is not an element of the plaintiff's case under Section 1 of the Sherman Act, on the other. Certainly, this Court's decision in *Pennington* does not purport to impose a predatory intent requirement, although the conspiracy in that case happens to have involved a scheme aimed at driving marginal competitors out of business. 381 U.S. at 664, 665. Indeed, far from holding that predatory element is an essential element of the plaintiff's case in these circumstances, the *Pennington* Court went out of its way to suggest the absence of any such requirement:

> "From the viewpoint of antitrust policy, . . . all such agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, *without regard to predatory intention or effect*

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9 Likewise, numerous courts have held that intent to restrain trade is not an element of a price-fixing claim under the Sherman Act. *See, e.g., All Care Nursing Serv., Inc. v. High Tech Staffing Servs., Inc.*, 135 F.3d 740, 747 (11th Cir. 1998); *United States v. All Star Indus.*, 962 F.2d 465, 474 n.18 (5th Cir. 1992), *overruled in part on other grounds, United States v. Calverley*, 37 F.3d 160, 163-64 & nn. 20, 27 (5th Cir. 1994); *United States v. Brown*, 936 F.2d 1042, 1045-46 (9th Cir. 1991); *see also United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309-10 (1956). The conspiracy between respondents and NFSA amounted to an agreement to fix prices in bidding for contracts in the industry (*see National Constructors Ass'n v. National Elec. Contractors Ass'n*, 498 F. Supp. 510, 534-35 (D. Md. 1980), *aff'd as modified*, 678 F.2d 492 (4th Cir. 1982)), and was therefore actionable without proof of predatory intent.

> *in the particular case*. For the salient characteristic of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy. . . . After the agreement the union's interest would be bound in each case to that of the favored employer group. *It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policy.*"

381 U.S. at 668 (emphasis added).

Moreover, several cases from this Court and the courts of appeals stand for the proposition that where the statutory and nonstatutory exemptions do not apply, antitrust claims against unions or arising out of labor-management agreements should be governed by the same principles of antitrust law that apply in any other antitrust case. As this Court observed in *Allen Bradley Co. v. Local Union No. 3, IBEW*, 325 U.S. 797, 811 (1945), "[a] business monopoly is no less such because a union participates, and such participation is a violation of the [Sherman] Act." Indeed, in *Ramsey v. United Mine Workers*, 401 U.S. 302 (1971), this Court explicitly determined that there is no "basis for . . . fashioning a new standard of proof applicable in antitrust actions against labor unions." *Id.* at 311.

The Third Circuit has expressly held that where the nonstatutory exemption is inapplicable, traditional antitrust principles should apply in determining the validity of an antitrust claim against a union. In *Larry V. Muko, Inc. v. Southwestern Pennsylvania Building & Constr. Trades Council*, 670 F.2d 421 (3d Cir. 1982), the plaintiff alleged that the defendant unions had illegally conspired with a competing employer in violation of Section 1 of the Sherman Act. 670 F.2d at 423. Having previously rejected application of the nonstatutory labor exemption (*id.*), the Third Circuit held that "settled antitrust principles would be appropriate and applicable to activity found to be nonexempt . . . ." *Id.* at 426 (internal quotation marks omitted)

(quoting *Consolidated Express, Inc. v. New York Shipping Ass'n*, 602 F.2d 494, 522-23 (3d Cir. 1979), *vacated*, 448 U.S. 902 (1980)); *see id.* ("we take this opportunity explicitly to reaffirm the holding in [*Consolidated Express*]").

The Fourth Circuit's imposition of a predatory intent requirement in antitrust conspiracy cases involving anticompetitive and non-exempt labor-management agreements is plainly inconsistent with the numerous decisions of this Court and other courts holding that predatory intent is not an element of a conspiracy claim under Section 1 of the Sherman Act. The approach followed by the Fourth Circuit is also inconsistent with cases holding that traditional antitrust principles are fully applicable to union defendants. Review by this Court is warranted to reconcile these competing lines of authority.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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June 17, 1998

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GRINNELL CORPORATION,
Plaintiff-Appellant,

v.

No. 97-1855

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA,
Defendants-Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey, II, Senior District Judge. (CA-94-3309-H)

Argued: December 5, 1997

Decided: January 21, 1998

Before LUTTIG and MOTZ, Circuit Judges, and JONES, United States District Judge for the Western District of Virginia, sitting by designation

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Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Ira Genberg, SMITH, GAMBRELL & RUSSELL, L.L.P., Atlanta, Georgia; Christopher Alan Weals, SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, Washington, D.C., for Appellant. William Walter Osborne, Jr., OSBORNE LAW OFFICES, P.C., Washington, D.C.; Sally Momsen Tedrow, O'DONOGHUE & O'DONOGHUE, Washington, D.C., for Appellees. **ON BRIEF:** Dana M. Richens, SMITH, GAMBRELL & RUSSELL, L.L.P., Atlanta, Georgia; Wilbur D. Preston, Jr., Robert M. Wright, WHITEFORD, TAYLOR & PRESTON, L.L.P., Baltimore, Maryland, for Appellant. Robert Matisoff, O'DONOGHUE & O'DONOGHUE, Washington, D.C., for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c)

OPINION

PER CURIAM:

Grinnell Corporation, a designer, manufacturer, and installer of fire sprinkler systems, has for years engaged in a fiercely-contested labor dispute with the Road Sprinkler Fitters Local Union No. 669 and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. While that case was pending before the National Labor Relations Board (NLRB), Grinnell brought this action against the local and national union

alleging, in a seven count complaint, various antitrust, labor law, and state tort claims.

After two years of extensive discovery, the parties filed dispositive summary judgment motions. Based on what the district court accurately characterized as "a massive record" including dozens of depositions, "voluminous exhibits," the transcript of a twenty-two day hearing before the ALJ in the related NLRB proceedings, and the ALJ's opinion (now on appeal to the NLRB) finding that Grinnell had committed various unfair labor practices, the court granted the defendants' motions for summary judgment on the antitrust and labor law claims and dismissed the state law claims. *See Grinnell Corp. v. Road Sprinkler Fitters Local Union No. 669*, No. H-94-3309 (D. Md. June 3, 1997). Grinnell appeals the grant of summary judgment on an antitrust claim and on two labor claims.

Grinnell's principal contention, alleged in Count I of its complaint, is that defendants conspired with the National Fire Sprinkler Association (NFSA), a trade association to which Grinnell belongs and to which prior to September, 1993, it had assigned its collective bargaining rights, to engage in activity amounting to an illegal restraint of trade under Section 1 of the Sherman Act. *See* 15 U.S.C.A. § 1 (West 1997). Grinnell asserts that defendants and NFSA conspired to withdraw the availability of a job program known as targeting from Grinnell in order to force Grinnell to reassign its bargaining rights to NFSA. Under this program, a contractor and the local union would negotiate concessionary rate agreements as to an individual project in a particular geographical area so the contractor might be able to compete with lower-cost, nonunion contractors. Grin-

nell also claims that, in an effort to standardize contract terms and employment conditions within the sprinkler industry, the defendants and NFSA conspired, during the course of negotiating their collective bargaining agreement, to prevent Grinnell from obtaining more favorable collective bargaining terms.

"[C]onduct as consistent with permissible competition as with illegal conspiracy, does not, standing alone, support an inference of anti-trust conspiracy." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). *See also Thompson Everett, Inc. v. National Cable Advert. L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995). Thus, to survive a summary judgment motion an antitrust plaintiff must "establish . . . a conscious commitment" to achieve an unlawful objective by common scheme, and must also "bring forward evidence that excludes the possibility that the alleged co-conspirators acted independently or based on a legitimate business purpose." *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 542-43 (4th Cir.), *cert. denied*, 502 U.S. 814 (1991) (internal quotation marks omitted). As in *Laurel Sand*, here the district judge concluded that the undisputed facts demonstrated that Grinnell could not "discharge this burden." *Id.* Judge Harvey explained that "[t]he record discloses as a matter of law first that defendant Local 669 acted unilaterally in withdrawing from Grinnell the right to participate in the job targeting program and second that the Union and the NFSA did not illegally conspire during their collective bargaining to prevent Grinnell from obtaining more favorable bargaining terms." Moreover, the judge further concluded, "assum[ing], *arguendo*, that there is a dispute of material fact as to the existence of a conspiracy between the

NFSA and the Union," the non-statutory labor exemption from antitrust liability shielded the alleged restraint.

Grinnell also claims (and alleges in Count II) that by withdrawing targeting opportunities from Grinnell, the defendants forced Grinnell to assign its bargaining rights to NFSA or to sign an Assent and Interim Agreement binding Grinnell to their collective bargaining agreement, and thus violated § 8(b)(4)(ii)(A) of the National Labor Relations Act, 29 U.S.C.A. § 158(b)(4)(ii)(A) (West 1973). Judge Harvey held that "[t]here is no evidence in this record that Grinnell was either forced by defendants or even asked during negotiations with the Union to once again become a member of the NFSA bargaining unit." The judge concluded that "on this record [] the Union by its conduct here was not requiring Grinnell to join the NFSA [bargaining unit] or lawfully coercing it in some other manner." Grinnell's final claim, contained in Count IV of the complaint, is that the defendants engaged in an illegal secondary boycott in violation of § 8(b)(4)(ii)(B) of the NLRA, 29 U.S.C.A. § 158(b)(4)(ii)(B) (West 1973). Again, Judge Harvey rejected Grinnell's position, concluding that the company had produced insufficient evidence to raise a genuine issue of disputed fact as to whether the defendants engaged in illegal secondary boycott activity.

On appeal, Grinnell repeats the arguments made below, asserting that the district court ignored evidence supporting its claims. After a painstaking review of the record, as well as consideration of the briefs, relevant statutes, case law, and the oral arguments of the parties, we conclude that Judge Harvey's assessment of the evidence was accurate and his rulings correct. Accord-

ingly, we affirm on the basis of the careful reasoning of the district court.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GRINNELL CORPORATION	*	
Plaintiff	*	
vs.	*	CIVIL NO.
ROAD SPRINKLER FITTERS LOCAL UNION NO. 669	*	H-94-3309
	*	
and		
UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA	*	
	*	
	*	
Defendants	*	

* * * * * * * *

Ira Greenberg and Smith, Gambrell & Russell, Atlanta, Georgia, and Christopher A. Weals and Seyfarth, Shaw, Fairweather & Geraldson, Washington, D.C., and Wilbur D. Preston, Jr. and Whiteford, Taylor and Preston, Baltimore, Maryland for plaintiff.

Robert Matisoff, Sally M. Tedrow and O'Donoghue & O'Donoghue, Washington, D.C. for defendant United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.

William W. Osborne, Jr. and Osborne Law Offices, Washington, D.C. for defendant Road Sprinkler Fitters Local Union No. 669.

June 3, 1997

HARVEY, Senior Judge:

Plaintiff Grinnell Corporation ("Grinnell") and defendants Road Sprinkler Fitters Local Union No. 669 ("Local 669" or the "Union") and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada ("United Association") are presently embroiled in a lengthy and bitter labor dispute which is pending before the National Labor Relations Board ("the NLRB"). For more than three years, Local 669 has been engaged in a strike against Grinnell. During the pendency of the labor case before the NLRB, Grinnell filed this civil action in this Court naming as defendants Local 669 and United Association.

In its seven count amended complaint, plaintiff Grinnell charges defendants with violations of the Sherman Act, with violations of provisions of the National Labor Relations Act (the "Act"), with the breach of no strike clauses contained in certain collective bargaining agreements and with tortious conduct under state law. Substantial damages and declaratory and injunctive relief are sought by plaintiff. Following a lengthy period of discovery, the parties have now filed dispositive motions. Presently pending are plaintiff's motion for partial summary judgment on three of the counts of the amended

complaint and defendants' motions for summary judgment on all counts.

The Court has now had an opportunity to consider the extensive memoranda and the voluminous exhibits submitted by the parties in support of and in opposition to these three pending motions. A massive record has been presented to the Court, and lengthy oral argument has been heard. For the reasons to be stated herein, the Court has concluded (1) that the motion of plaintiff Grinnell for partial summary judgment must be denied; (2) that the motion for summary judgment of defendant Local 669 must be granted as to Counts One, Two, Three and Four of the amended complaint; (3) that the motion for summary judgment of defendant United Association must also be granted as to Counts One, Two, Three and Four of the amended complaint; and (4) that Counts Five, Six and Seven of the amended complaint must be dismissed.

I

Background Facts

Plaintiff Grinnell is the largest designer, manufacturer and installer of fire sprinkler systems in the United States. For many years, Grinnell has been a member of the National Fire Sprinkler Association ("the NFSA"), a trade association whose membership includes some 270 fire sprinkler contractors.[1] Most of Grinnell's employees,

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[1] In 1994, 135 of these members authorized the NFSA to represent them in multi-employer collective bargaining, 60

known as "sprinkler fitters," have been represented for purposes of collective bargaining by different member locals which are affiliated with defendant United Association. Defendant Local 669 is the largest of these locals.

During its many years of membership, Grinnell had been represented by the NFSA in bargaining negotiations with Local 669. The NFSA has over the years represented some but not all of its union contractor members in multi-employer collective bargaining with Local 669 and other unions. In September of 1993, Grinnell revoked all previous bargaining authority granted to the NFSA and advised Local 669 that in the future it would bargain independently with that Union.[2] At the time, the most recent of a series of collective bargaining agreements between Grinnell and Local 669 was due to expire on March 31, 1994. Grinnell withdrew bargaining authority from the NFSA in the belief that it could negotiate more profitably on its own.

In November of 1993, Grinnell commenced bargaining with the Union independently. However, the first face-to-face meeting between representatives of the parties was not held until March of 1994, and bargaining sessions continued into early April. When these negotiations were not successful, Local 669 called, effective

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members negotiated separately with Local 669, and the remaining 75 members were non-union contractors.

[2] Although revoking bargaining authority, Grinnell has remained a member of the NFSA.

at midnight on April 12, 1994, a nationwide strike against Grinnell which continues to this day. Grinnell then informed its employees and Local 669 that it was implementing its final offer, effective April 14, 1994.

One of the principal areas of dispute in the labor negotiations between the parties and in this case relates to the program known as "targeting." Under this program, a contractor and Local 669 would negotiate concessionary rate agreements on a project-by-project basis in a particular geographical area in order that the particular employer might be able to compete with lower cost, nonunion contractors. At all times, the Union reserved the right to determine in its discretion whether a concessionary wage or other rate would be granted for a particular job and the amount of the reduction. Targeting had been instituted by the Union in November of 1991, and Grinnell was one of the principal users of the program. However, the 1991-1994 collective bargaining agreement contained no reference to the targeting program, which had become operative pursuant to supplemental agreements between the NFSA and the Union.[3]

Some months before the start of formal negotiations for the new 1994-1997 collective bargaining agreement, the Union distributed to Grinnell and other independent contractors a so-called "Assent and Interim Agree-

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[3] A Letter of Understanding was executed by representatives of the Union and the NFSA in November of 1991. A similar document was later executed in November of 1992, extending the program through May 31, 1993.

ment."[4] A contractor signing such a document would agree to be bound by the terms of the new collective bargaining agreement later negotiated by the Union and the NFSA, and in return the Union would agree to continue to work for that particular employer if the current agreement expired and there was a strike against the other employers represented by the NFSA. Grinnell declined to sign such an Agreement.

In May of 1993, the Union imposed the requirement that, in order to be eligible to participate in targeting after June 1, 1993, a contractor had to agree to remain part of the NFSA multi-employer bargaining group during negotiations for the new 1994-1997 collective bargaining agreement, or had to agree to be bound by the new agreement negotiated by the Union and the NFSA. The NFSA disagreed with the Union's decision to impose these new conditions. Grinnell would not consent to these new conditions, and the Union then refused to permit targeting on any of Grinnell's jobs. In July of 1993, John Lundak, the Union's new business manager, reinstated Grinnell and other union contractors as participants in the targeting program. Later, in the fall of 1993, the Union once again excluded Grinnell and other similarly situated contractors from the targeting program, effective November 15, 1993.

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[4] The offering of such an interim agreement to an employer not represented in multi-employer bargaining is a fairly common strategy employed by unions in preparing for negotiations. *See, e.g., Charles D. Bonanno Linen Serv. Inc.*, 243 N.L.R.B. 1093 (1979), aff'd, 454 U.S. 404 (1982).

During the negotiations between the parties between November of 1993 and April 12, 1994, Grinnell sought control of targeting and proposed that provisions requiring the application of targeting to certain projects be included in the new collective bargaining agreement. The Union resisted these demands, claiming that a uniform rate would defeat the purpose of targeting. No agreement on the targeting issue was ever reached by the parties when bargaining was discontinued on April 12, 1994.

Until March 28, 1994, Lundak was the representative of the Union who conducted negotiations with Grinnell. However, based on internal union strife and charges of misconduct on the part of Lundak, the General President of United Association imposed a trusteeship on Local 669 in the midst of ongoing negotiations between Grinnell and the Union. Tommy L. Preuett was appointed trustee, and after March 28, 1994, Preuett assumed responsibility for negotiating with Grinnell. Negotiations between Local 669 and the NFSA were being conducted at the same time as those between Local 669 and Grinnell. Final agreement with the NFSA was reached on April 8, 1994. Grinnell was aware of the terms of the final agreement between the Union and the NFSA when it discontinued negotiations on April 12, 1994.

On April 15, 1994, defendants filed charges with the NLRB, alleging unfair labor practices by Grinnell.[5]

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[5] While the parties were still engaged in negotiations, Grinnell in February of 1994 had filed a charge of unfair labor practices against the Union. It was alleged that the offer of

Following an investigation, the Regional Director issued a complaint on March 29, 1995 and amended complaints on September 29 and December 1, 1995, alleging that Grinnell had committed numerous violations of the Act.[6] Extensive discovery was then undertaken by the parties in the labor case. On twenty-two separate dates between October 16, 1995 and March 28, 1996, evidentiary hearings were held before Administrative Law Judge Richard A. Scully ("the ALJ"). Thirteen different alleged violations of the Act by Grinnell had been charged by the Regional Director in the complaints and were before the ALJ for consideration in the proceedings before him.

On January 16, 1997, the ALJ issued a thirty-four page Decision, making detailed findings of fact and conclusions of law. Seven of the allegations of violations were sustained; five allegations were dismissed, and one was stayed pending the resolution of this suit. The principal issue before the ALJ was whether or not the parties were at an impasse when Grinnell implemented its final contract offer, effective April 14, 1994. Section 8(a)(5) of the Act makes it an unfair labor prac-

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Local 669 to extend targeting only to contractors represented by the NFSA and to certain independents who signed Assent and Interim Agreements constituted an unfair labor practice. On April 13, 1994, the Regional Director declined to issue a complaint and that refusal was later upheld by the Office of Appeals.

6 These complaints have been docketed before the NLRB as Cases 5-CA-24521, 5-CA-25227 and 5-CA-25406.

tice for an employer "to refuse to bargain collectively with the representatives of his employees." Defining the obligation "to bargain collectively," § 8(d) of the Act requires, *inter alia*, that the employer and employees "meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment. . . ." If the employer declares an impasse prematurely or in bad faith, the employer thereby fails to satisfy the duty to bargain and exposes itself to the charge that it committed an unfair labor practice in violation of § 8(a)(5) and (1) of the Act. *AMF Bowling Co. v. NLRB*, 63 F.3d 1293, 1299 (4th Cir. 1995).

Based on the evidence presented at the hearings before him, the ALJ determined in his Decision that the parties had not reached an impasse on April 12, 1994. He determined, *inter alia*, that only four negotiating sessions totaling no more than thirteen hours of actual bargaining had been held and that negotiating over this period of time was under the circumstances insufficient for a showing by Grinnell that further bargaining would have been futile. The ALJ concluded that Grinnell had "violated Section 8(a)(5) and (1) of the Act by on and after April 13 refusing to meet and bargain in good faith with the Union; on or about April 14 unilaterally changing terms and conditions of employment by implementing its final contract offer when there was no impasse in bargaining; and offering employees better wage rates than contained in its final contract offer to the Union." (Decision, p. 32).[7] One of the allegations

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[7] The ALJ also found that Grinnell had violated § 8(a)(1) and § 8(a)(3) and (1) of the Act and that the strike which com-

made by the Regional Director in one of the complaints he filed was that Grinnell had violated § 8(a)(1) of the Act by filing and prosecuting this lawsuit in retaliation against activity protected by the Act. Relying on *Bill Johnson's Restaurants. Inc. v. NLRB*, 461 U.S. 731 (1983), the ALJ concluded in his Decision that a ruling on the retaliation charge should be stayed pending resolution of this civil action.

Both Grinnell and the defendants have filed with the NLRB exceptions to the ALJ's findings and conclusions. A hearing on those exceptions has not as yet been scheduled by the NLRB.

II

Summary Judgment Principles

It is well established that a party moving for summary judgment bears the burden of showing the absence of any genuine issue of material fact and that it is entitled to judgment as a matter of law. *Barwick v. Celotex Corp.*, 736 F.2d 946, 958 (4th Cir. 1984). Where, as here, the nonmoving party will bear the ultimate burden of persuasion at trial, "the burden on the moving party [at the summary judgment stage] may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

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menced on April 12 was a lawful unfair labor practice strike.

One of the purposes of Rule 56 of the Federal Rules of Civil Procedure is to require a plaintiff, in advance of trial and after a motion for summary judgment has been filed and properly supported, to come forward with some minimal facts to show that a defendant may be liable under the claims alleged. *See* F.R.Civ.P. 56(e). If the nonmoving party "fail[s] to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof," then "the plain language of Rule 56(c) mandates the entry of summary judgment." *Catrett*, 477 U.S. at 323.

While the facts and all reasonable inferences drawn therefrom must be viewed in the light most favorable to the party opposing the motion, *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985), "when the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "'A mere scintilla of evidence is not enough to create a fact issue; there must be evidence on which a jury might rely.'" *Barwick*, 736 F.2d at 958-59 (quoting *Seago v. North Carolina Theaters, Inc.*, 42 F.R.D. 627, 640 (E.D.N.C. 1966), *aff'd*, 388 F.2d 987 (4th Cir. 1967), *cert. denied*, 390 U.S. 959 (1968)). Moreover, only disputed issues of *material* fact, determined by reference to the applicable substantive law, will preclude the entry of summary judgment. "Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In the absence of the necessary minimal showing by a plaintiff that the defendant may be liable under the

claims alleged, the defendant should not be required to undergo the considerable expense of preparing for and participating-in a trial. *See Catrett*, 477 U.S. at 323-24; *Anderson*, 477 U.S. at 256-57. Indeed, the Fourth Circuit has stated that, with regard to motions for summary judgment, the district courts have "an affirmative obligation . . . to prevent 'factually unsupported claims and defenses' from proceeding to trial." *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (quoting *Catrett*, 477 U.S. at 323-24).

The Fourth Circuit has further articulated the standard for summary judgment to be used when a plaintiff is asserting antitrust claims, as follows:

> While we have recognized generally that when considering a motion for summary judgment, the district court must 'draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion,' . . ., we hasten to add that those inferences must, in every case, fall within the range of reasonable probability and not be so tenuous as to amount to speculation or conjecture. . . . Moreover, the inferences which may be drawn vary from one substantive area of the law to another. Thus, on summary judgment motions in antitrust cases, the Supreme Court has instructed that when there is evidence of conduct that is consistent with both legitimate competition and an illegal conspiracy, courts may not infer that an illegal conspiracy has occurred without other evidence. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

Thompson Everett, Inc. v. National Cable Advert., L.P., 57 F.3d 1317, 1323 (4th Cir. 1995).

Applying these principles to the facts of record here, this Court has concluded that plaintiff's motion for partial summary judgment must be denied and that both of defendants' motions for summary judgment must be granted as to Counts One, Two, Three and Four of the amended complaint.

III

The Claims

In its amended complaint, plaintiff Grinnell has asserted numerous different claims against the defendants. Count One alleges that defendants and certain co-conspirators including the NFSA, in violation of § 1 of the Sherman Act, engaged in unlawful combinations and conspiracies in unreasonable restraint of trade and commerce and entered into contracts and agreements to effectuate such combinations and conspiracies. Count Two is brought under § 303 of the Labor Management Relations Act (the "LMRA") and charges the defendants with a violation of § 8(b)(4)(ii)(A) by coercing Grinnell where an object thereof was to force Grinnell to designate the NFSA as its bargaining agent or be bound to future collective bargaining agreements. Count Three seeks damages from defendants under § 301 of the LMRA for their breach of no-strike clauses contained in labor agreements covering certain projects. Count Four is also brought under § 303 of the LMRA and charges defendants with violating § 8(b)(4)(ii)(B) by engaging in illegal picketing against L.F. Driscoll Company in order

to force it and other contractors to cease doing business with Grinnell.

Count Five of the amended complaint is brought under state law and charges defendants with tortious interference with contracts between Grinnell and various owners of projects. In Count Six, plaintiff alleges under state law that defendants interfered with Grinnell's business expectancies with various owners of projects and put Grinnell at a competitive disadvantage in the business market. Count Seven asserts a common law claim of defamation.

Plaintiff Grinnell is here seeking summary judgment in its favor as to Counts One, Two and Seven of the amended complaint. By their motions, both defendants seek the entry of summary judgment in their favor as to all seven counts of the amended complaint.

Plaintiff's briefs and arguments present a veritable laundry list of legal theories whereby plaintiff seeks to defuse the impact of the charges of unfair labor practices which have been brought against it in the pending labor case before the NLRB and which have now been upheld by the ALJ. Relying on many of the same facts at issue in the labor case, plaintiff Grinnell has asked this Court to impose liability on defendants under theories different from those involved in the pending NLRB proceedings. According to plaintiff, defendants have violated federal antitrust law and federal labor law and have engaged in tortious conduct resulting in damage to Grinnell. Voluminous discovery has been undertaken by the parties both in the matter pending before the NLRB and in this case, and a massive record has been presented to this Court. But try as it might, plaintiff Grinnell has not

been able to fit the material facts of record into any viable theory which would permit a recovery against the two named defendants. Exhaustive development of the facts has done no more than establish that defendants have not violated the Sherman Act or the National Labor Relations Act. Moreover, under the circumstances here, the Court will not exercise supplemental jurisdiction over plaintiff's state law claims.

IV

Defendants' Motions for Summary Judgment

A. Count One - Claims Under Antitrust Law

In Count One of the amended complaint, plaintiff Grinnell has alleged several separate and independent violations of federal antitrust law. Relying on *National Constructors Ass'n. v. National Electrical Contractors Ass'n. Inc. ("NCA v NECA")*, 498 F. Supp. 510 (D. Md. 1980) *modified*, 678 F.2d 492 (4th Cir. 1982) plaintiff contends that defendants violated § 1 of the Sherman Act by illegally conspiring with the NFSA to withdraw the job targeting program from Grinnell in an effort to force Grinnell to return to the NFSA bargaining unit. Second, relying on *United Mine Workers v. Pennington*, 381 U.S. 657, 669 (1965), plaintiff asserts that the Union and the NFSA, in order to keep contract terms and conditions uniform in the sprinkler industry, illegally conspired during the course of collective bargaining to prevent Grinnell from obtaining any bargaining terms that were more favorable than the terms agreed upon by the Union and NFSA. Claims of price fixing and illegal tying arrangements are also asserted in Count One.

In support of their motions seeking summary judgment as to Count One, defendants first contend that facts of record in this case establish that plaintiff Grinnell cannot meet its burden of proving the elements of a substantive antitrust claim. Defendants next rely on the so-called statutory exemption established by § 20 of the Clayton Act, 29 U.S.C. § 52, and § 4 of the Norris LaGuardia Act, 29 U.S.C. § 104, and on the nonstatutory exemption recognized by the Supreme Court in *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965) and *Connell Constr. Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (1975).

Section 1 of the Sherman Act provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. (15 U.S.C. § 1.)

To prevail on a Section 1 claim, Grinnell must prove two elements: a contract, combination or conspiracy; and an unreasonable restraint of trade affecting interstate commerce. *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 220 (4th Cir. 1994).

To avoid the entry of summary judgment against it in an antitrust case on the ground that proof of conspiracy does not exist, a plaintiff must discharge a two-fold evidentiary burden. *Laurel Sand & Gravel. Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 543 (4th Cir. 1991), *cert. denied*, 502 U.S. 914 (1991). First, a plaintiff must show "'a conscious commitment [by defendants] to a common scheme designed to achieve an unlawful objec-

tive.'" *Id.* at 542 (citations omitted). Second, the plaintiff must "bring forth evidence that excludes the possibility that the alleged coconspirators acted independently or based on a legitimate business purpose." *Id.* at 543.

When the voluminous record here is considered in the light of the pertinent authorities, this Court concludes that plaintiff's Section 1 claims must fail. The record discloses as a matter of law first that defendant Local 669 acted unilaterally in withdrawing from Grinnell the right to participate in the job targeting program and second that the Union and the NFSA did not illegally conspire during their collective bargaining to prevent Grinnell from obtaining more favorable bargaining terms.

The targeting program was first established by the Union in 1991. The NFSA not only had no part in instituting that program but also had even opposed it. At all times, the Union had the final say as to whether any concessionary rate would be granted for a particular project and also as to the amount of the reduction. The Union further reserved the right at all times in its sole discretion to withdraw targeting from a contractor.

Plaintiff Grinnell argues that targeting decisions were jointly made by the Mutual Cooperation Committee (the "MCC"). The MCC was formed pursuant to provisions of the 1991-1994 Collective Bargaining Agreement. It was composed of representatives of both the Union and the NFSA. In May of 1993, the Union changed the conditions whereby a contractor might thereafter participate in its targeting program. The Union required that the program would be extended only to those contractors who would agree to remain a part of the NFSA multi-

employer bargaining group through negotiation of the next agreement or to those contractors who, although independent, would agree to be bound by provisions of the new agreement which would become effective on April 1, 1994. The NFSA did not participate in, and in fact disagreed with, the Union's decision imposing these new conditions. The NFSA further refused to deal with the Union regarding the new conditions on behalf of the contractors which it represented. These new conditions were imposed upon all union contractors whether or not they were members of the NFSA and whether or not they were represented by the NFSA in collective bargaining.

When the new targeting conditions were first imposed in May of 1993, the NFSA consulted with counsel to see if the Union's action could be challenged. In its legal opinion, counsel pointed out that the NFSA was not a party to targeting participation agreements and that Local 669 was privileged to make the independent judgment that continued participation in job targeting would be conditioned in the manner mandated by the Union. By letter dated June 30, 1993, the NFSA notified its members that it had not participated in the Union's decision to place conditions on future participation in the targeting program and that it was not happy with the Union's action. It specifically stated:

> The Association is neither a party to nor is responsible for such agreements and . . . cannot successfully challenge them.

As the newly elected business manager, John Lundak, on July 19, 1993, rescinded the restrictions placed on targeting by the Union and reinstated Grinnell and

other contractors as participants in the targeting program. Later, on October 18, 1993, Lundak reimposed the restrictive targeting conditions set in May, to become effective November 15, 1993. The Union decided to extend the targeting program only to those employers who either signed an Assent and Interim Agreement or to those who agreed to be represented by the NFSA in bargaining for the next labor agreement. This decision was made unilaterally and was not the result of any agreement with the NFSA.

In arguing that the NFSA and the Union wrongfully conspired to withdraw targeting from Grinnell, reliance is placed by plaintiff on a Letter of Understanding signed by the Union and the NFSA on July 14, 1993, on a letter dated July 19, 1993 sent by Lundak to signatory contractors and on a letter of July 19, 1993 to all members of the NFSA. Plaintiff Grinnell argues that these documents constitute evidence that reinstatement of the targeting program was action taken jointly by the Union and the NFSA. However, it is not the *reinstatement* of contractors as participants in the targeting program in July which is an essential element of plaintiff's claim of conspiracy. Rather, it is the *withdrawal* of the targeting program from Grinnell and certain other contractors effective on November 15, 1993 which must be proved by plaintiff to have been joint action amounting to an illegal conspiracy. But the November action was not undertaken by way of a joint agreement. With bargaining *for* a new contact about to commence, the Union unilaterally decided to extend the targeting program only to those employers who signed an Assent and Interim Agreement or who agreed to be represented by the NFSA for future bargaining. Neither through its repre-

sentatives on the MCC nor otherwise did the NFSA play any part in this decision. Lundak's letter of October 18, 1993, relied upon by plaintiff, cannot reasonably be read as indicating that the NFSA had jointly agreed with the Union to withdraw the targeting program from Grinnell and certain other contractors. According to the testimony of all Local 669 witnesses and all NFSA witnesses, the NFSA did not participate in any way in the decision to reimpose in November the conditions which had to be met by contractors if they were to participate in targeting. The NFSA did not protest the Union's decision to withdraw targeting from certain contractors because it had earlier been advised by counsel that it had no grounds for doing so.

Plaintiff argues that the Union and the NFSA entered into a bilateral agreement to take away from Grinnell a "discount" enjoyed by other contractors under the targeting program and to thereby place Grinnell at a competitive disadvantage. But Grinnell never had a right to such a discount. The Union had always reserved to itself the right in its discretion to permit targeting by a particular contractor or to deny targeting to a particular class of contractors. There had never been an agreement between the NFSA and the Union which prohibited the Union from restricting the application of targeting to particular contractors.[8] This was not, as plaintiff argues, a selective withdrawal of the program from Grinnell

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[8] In a letter dated January 12, 1995 to the NLRB, counsel for Grinnell acknowledged that the targeting program "had not been included in the parties' Agreement and was completely discretionary. . . ."

alone. Other contractors who were not represented by the NFSA in collective bargaining were likewise faced with the choice of either going along with the Union demands or not receiving the benefits of targeting.

Plaintiff places heavy reliance on the *NCA v. NECA* case. Such reliance is misplaced. The illegal conduct in that case resulted from the defendants' agreement to impose a one percent charge on all contracts as a contribution to an industry fund which was not related to the price of labor or other working conditions and which was not of benefit to employees. Here, the price of labor and the number of working hours were clearly affected by the application of targeting to a particular project. When targeting was applied to a particular job, the Union was thereby agreeing that employees would be paid less than the bargained rate in order that the employer might have a better opportunity to be awarded the contract and that more hours of work for members of the Union would accordingly be provided

Plaintiff Grinnell seeks to derive inferences from various facts of record in support of its contention that proof of an illegal conspiracy exists in this case. But these inferences are so tenuous as to amount to no more than speculation and conjecture. *See Thompson Everett*, 57 F.3d at 1323. They do not "fall within the range of reasonable probability" so as to create a jury issue as to plaintiff's claim that the Union conspired with the NFSA to withdraw targeting from Grinnell. *Id.* Moreover, since there was no agreement to withdraw targeting, no illegal conspiracy to fix prices has been proved.

Similarly, evidence does not exist that the Union conspired during its bargaining with the NFSA to pre-

vent Grinnell from obtaining more favorable terms than those contained in the collective bargaining agreement reached between the Union and the NFSA. This claim, asserted in this case by plaintiff Grinnell under *Pennington*, is foreclosed by the Fourth Circuit's opinion in *Smitty Baker Coal Co. v. United Mine Workers*, 620 F.2d 416 (4th Cir.), *cert. denied*, 449 U.S. 870 (1980). In his opinion in *NCA v. NECA*, Judge Murray noted that the Fourth Circuit had in *Smitty Baker* set out the requirements for providing an antitrust violation in a "*Pennington*-type case." 498 F. Supp. at 541. The *Smitty Baker* court laid down the following test which must be applied in a case like the one now pending before this Court:

> To amount to an antitrust violation the agreement must be rooted in an anti-competitive purpose, and must effect an anti-competitive result, as evidenced by action "ruining" a competitor's business or driving him "out of business." Unless there is such an agreement between the labor organization and the non-labor group and such an anti-competitive result, there is no conspiracy actionable under the antitrust laws.

620 F.2d at 431-32.

No evidence exists that defendants conspired with the NFSA to "ruin" Grinnell, to "drive it out of business" or to accomplish any other anti-competitive purpose. Any assurances given by the Union to the NFSA were for the purpose of reaching a new collective bargaining agreement. The Union's goal may well have been to maintain uniformity in the negotiating process but there

was clearly no intention to effect an anti-competitive result prohibited by antitrust law.

According to plaintiff, the Union and the NFSA were determined to prevent Grinnell from bargaining independently with Local 669. The NFSA had demanded during its negotiations with the Union that the agreement contain a "most favored nation" clause.[9] Plaintiff contends that Local 669 and the NFSA agreed that Grinnell would not receive a more favorable agreement than the one negotiated between these parties. But evidence does not exist that any such agreement was ever reached. Although the NFSA pressed hard for inclusion of a most favored nation clause in the agreement, the demand was eventually dropped and was not included as a part of the final collective bargaining agreement reached between the Union and the NFSA. Moreover, during negotiations with Grinnell, the Union did not even insist that the terms and conditions of the Grinnell agreement be the same as those contained in the NFSA agreement.

The Union at all times remained flexible in its bargaining sessions with Grinnell, and indeed, some of the wage concessions made were more favorable to Grinnell than those contained in the agreement reached with the NFSA. There was even bargaining between Grinnell

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[9] A "most favored nation clause" in a collective bargaining agreement is an undertaking by the union that if it later agrees to more advantageous terms with another employer, the employer with the most favored nation clause in its agreement will receive the benefit of those more favorable terms. *See, e.g., Associated Milk Dealers, Inc. v. Milk Drivers Union, Local 753*, 422 F.2d 546 (7th Cir. 1970).

and the Union concerning the targeting program. During the negotiations, Grinnell sought some control over targeting, but the Union refused to accede to these demands.

Plaintiff relies on evidence indicating that Preuett stated during negotiations with the NFSA that no other contractor would get a better deal than the NFSA. However, as the ALJ determined when considering this very same evidence, "posturing" of this sort is to be expected during labor negotiations. (Decision, p. 14).

Evidence of a conspiracy or of an agreement to fix prices thus does not exist. In their bargaining and in the collective bargaining agreement eventually reached by them on April 8, 1994, the Union and the NFSA were doing no more than seeking to obtain the best terms that they could negotiate in furtherance of their legitimate business interests. It is not enough to defeat a motion for summary judgment in an antitrust case for the plaintiff to rely on evidence of conduct that is consistent with both legitimate competition and with an illegal conspiracy *Thomas Everett*, 57 F.3d at 1323, (citing *Matsushita*, 475 U.S. at 574). Under such circumstances, a court may not infer that an illegal conspiracy has occurred. *Id.*

Even were this Court to assume, *arguendo*, that there is a dispute of material fact as to the existence of a conspiracy between the NFSA and the Union to withdraw targeting from Grinnell, the record here establishes that any restraint of trade resulting from any such conspiracy was not an unreasonable one under the nonstatutory labor exemption recognized by the Supreme Court in *Jewel Tea* and *Connell*, 391 U.S. at 692-93 and 421 U.S.

at 622. Presented to this Court against a backdrop of an ongoing labor dispute between the parties, the antitrust claims asserted by plaintiff in this case require the Court to reconcile two conflicting national policies, one expressed in the antitrust laws and designed to prevent monopoly and promote competition, and the other expressed in federal labor law and based on a labor policy favoring collective bargaining over labor standards between employers and employees with the inevitable goal of eliminating competition among workers over wages and labor costs. *Smitty Baker*, 620 F.2d at 423. With such disparate aims, these two policies would "inescapably clash unless carefully harmonized." *Id.* Both the statutory exemption enacted by Congress and the nonstatutory exemption recognized by the Supreme Court seek to harmonize these two conflicting national policies. As in *NCA v. NECA*, the Court is here called upon to decide, *inter alia*, the question which is at the heart of the labor exemption, namely, under what circumstances does the national labor policy outweigh the national antitrust policy and dictate that an agreement which would otherwise run afoul of the Sherman Act be held immune under labor law. 498 F. Supp. at 541.

In its recent decision in *Brown v. Pro Football, Inc.*, 116 S.Ct. 2116, 2119 (1996), the Supreme Court recognized that the nonstatutory labor exemption applies "where needed to make the collective bargaining process work." The Court pointed out in *Brown* that the labor laws give the NLRB, and not a federal court in an antitrust case, primary responsibility for policing the collective bargaining process. *Id.* at 2123. One of the objectives of the labor laws "was to take from antitrust courts the authority to determine through application of the

antitrust laws, what is socially or economically desirable collective bargaining policy." *Id.*

The test to be applied in a case such as this one is that recognized by several circuit courts. Under that test, the parties to an agreement restraining trade are exempt from antitrust liability if (1) the restraint primarily affects the parties to the agreement and no one else; (2) the agreement concerns wages, hours or conditions of employment that are mandatory subjects of collective bargaining, and (3) the agreement is produced from *bona fide* arms-length collective bargaining. *Phoenix Elec. Co. v. National Elec. Contractors Ass'n.*, 81 F.3d 858, 861 (9th Cir. 1996); *Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir. 1976).

Insofar as the alleged conspiracy to withdraw targeting is concerned, the requirements for the application of the nonstatutory labor exemption have been met in this case. The challenged conduct in question occurred at a time when the Union was preparing to engage in the collective bargaining process. *Brown*, 116 S.Ct. at 2123. If the Court were to assume, *arguendo*, that the Union and the NFSA agreed to withdraw the job targeting program from contractors who would not be signatories to the new 1994-1997 collective bargaining agreement, such an undertaking on their part would have primarily affected the parties themselves, would have concerned wages, hours and conditions of employment and would have been produced during *bona fide* arms-length collective bargaining between the parties. In *Phoenix Electric Co.*, the Ninth Circuit held that a targeting program incorporated into a labor agreement was protected by the nonstatutory exemption because it had been reached by means of arms-length bargaining and af-

fected the wages of members of the union. 81 F.3d at 861-62.

Plaintiff argues that the nonstatutory exemption cannot be applied in this case because the restraints in question had nothing to do with wages and other working conditions. There is overwhelming evidence to the contrary. The record here clearly shows that the restraint challenged by plaintiff concerned wages and other conditions of employment, and that its effects were felt principally in the labor market. The conduct in question was part of the Union's bargaining strategy and was designed to advance the Union's interests. The targeting program was not withdrawn solely from Grinnell but its availability was denied to all employers in the labor market who did not accede to the Union's demands.

To prevail both in its claim that an illegal conspiracy existed between the NFSA and the Union to withdraw targeting from Grinnell and in its claim that there was an illegal conspiracy to prevent Grinnell from obtaining more favorable terms, plaintiff must prove that the Union acted with an improper motive. However, in its recent *Brown* opinion, the Supreme Court emphasized that it is not the role of a court in an antitrust case to examine the motives of the parties to a labor agreement reached during collective bargaining. In a case such as this one, a court should not "decide the lawfulness of activities intimately related to the bargaining process." 116 S.Ct. at 2124. Plaintiff argues that the Union's motive in assuring the NFSA that it did not need a most favored nation clause in its collective bargaining agreement was an anti-competitive one barred by the Sherman Act. However, under *Brown*, this Court may not in circumstances like those present in this case "attempt to investigate [a

bargaining party's] subjective motive. . . ." 116 S.Ct. at 2125. Brown cautioned that courts in an antitrust case should not "second-guess the parties' bargaining decisions." 116 S.Ct. at 2125.

In sum, this Court is satisfied, alternatively, that under the nonstatutory exemption which is applicable here, the conduct challenged in this case involving collective bargaining between Local 669 and the NFSA does not give rise to antitrust liability.

For all these reasons, defendants' motions for summary judgment will be granted as to Count One of the amended complaint.[10]

B. Count Two - Labor Law Claim

In Count Two of the amended complaint which has been brought under § 303 of the LMRA, plaintiff Grinnell asserts that the same conduct of defendants claimed by it in Count One to have violated the Sherman Act is also violative of the National Labor Relations Act. Plaintiff contends that a union violates Section 8(b)(4)(ii)(A) of the Act when by means of a strike or other form of coercion it forces an employer to join a multi-employer organization. According to plaintiff, defendants violated the statute by refusing to permit Grin-

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[10] There is no merit to Grinnell's further contention that the defendants' conduct in withdrawing targeting from Grinnell constituted an illegal tying arrangement prohibited by the Sherman Act. None of the cases cited by Grinnell furnish support for its claim that conduct of the sort involved in this case during a labor dispute can constitute an illegal tying arrangement prohibited by antitrust law.

nell to participate in the targeting program unless it used the NFSA as its bargaining agent or signed an Assent and Interim Agreement.

In relevant part, Section 8(b)(ii)(4) provides as follows:

> [i]t shall be an unfair labor practice for a labor organization or its agents --
>
> * * *
>
> (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where . . . an object thereof is
>
> (A) forcing or requiring any employer . . . to join any employer organization. . . .

On the record here, this Court concludes that the claim asserted by plaintiff Grinnell in Count Two of the amended complaint must fail. There is no evidence in this record that Grinnell was either forced by defendants or even asked during negotiations with the Union to once again become a member of the NFSA bargaining unit. If Grinnell wished to continue to participate in the targeting program, it had the option of either joining the NFSA bargaining unit or signing an Assent and Interim Agreement. If it did the latter, it received the benefit of not being subjected to a strike by the Union if agreement could not be reached with other contractors. It is clear from decisions of the NLRB that an employer does not become a *de facto* or *de jure* member of a multi-employer bargaining group merely by virtue of its agreement to be bound by future contracts between an employer association and a union. *See, e.g., Ted*

Hicks & Assocs., 232 N.L.R.B. 712, 713 (1977), *enf'd*, 572 F.2d 1024 (5th Cir. 1978).

The same claim asserted by Grinnell in Count Two was previously presented by it to the NLRB by way of an unfair labor charge against the Union. By letter dated April 13, 1994, the Regional Director of Region 5 declined to issue a complaint in the matter. Case 5-CC-1208. The Regional Director concluded:

> As a result of the investigation, it does not appear that the Union violated Section 8(b)(4)(ii)(A) of the Act. The evidence disclosed that the Union conditioned its agreement to an extension of a job targeting program (JTP) on the Employer's agreement to be bound by the next contract between the Union and the National Fire Sprinkler Association (NFSA). In the absence of such agreement, the Union refused to extend the JTP beyond its expiration date, which came four months before the expiration of the NFSA contract. In spite of its refusal to extend the JTP to former NFSA Members, the Union is not refusing to bargain with the Employer on an individual basis. The evidence does not show that the Union was requiring the Employer to join the NFSA or that it is unlawfully coercing the Employer in some other manner to cede its bargaining rights to the NFSA. Based on the forgoing, further proceedings are not warranted, and I am refusing to issue a complaint in this matter.

Grinnell's appeal from the Regional Director's refusal to issue a complaint was denied by the Director of the Office of Appeals on June 23, 1994.

As did the Regional Director,[11] this Court finds on this record that the Union by its conduct here was not refusing to bargain with Grinnell on an individual basis and was not requiring Grinnell to join the NFSA or unlawfully coercing it in some other manner. Good faith bargaining with Grinnell was undertaken by the Union, and it even offered Grinnell certain wage concessions not included in the agreement reached with the NFSA.

Moreover, the withdrawal of targeting did not constitute coercion but was a lawful bargaining strategy employed by the Union. Grinnell had been a principal user of targeting during the period of time when it had been permitted by the Union to participate in the program. The Union hoped that, by exercising its right to deny targeting to Grinnell, it could persuade this employer to accede to other demands which the Union was making

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[11] Although no *res judicata* or collateral estoppel effect may be given to the Regional Director's refusal to issue a complaint based on the same claim asserted by Grinnell in Count Two, his findings in this context "are entitled to great weight." *Hanna Mining Co. v. District 2, Marine Eng'rs Beneficial Ass'n*, 382 U.S. 181, 192 (1965). Faced with the Regional Director's determination, Grinnell has the burden of demonstrating that genuine issues of fact exist in spite of the Board's finding. *Smith v. Local No. 25, Sheet Metal Workers Int'l Ass'n.*, 500 F.2d 741, 748 n.4 (5th Cir. 1974). Grinnell has failed in this case to meet that burden.

during the bargaining sessions. Indeed, at one point during its negotiations with Grinnell, the Union even offered to reinstate targeting if Grinnell in turn would agree to certain of its other demands. When Grinnell decided not to accept these proposals, it remained excluded from targeting. In the absence of proof of coercion or threats, defendants' conduct did not constitute an unfair labor practice.

Accordingly, summary judgment will also be entered in favor of the defendants as to Count Two of the amended complaint.

C. Count Three - Labor Law Claim

Count Three of the amended complaint has been brought under § 301 of the LMRA. In Count Three, plaintiff Grinnell seeks damages for the alleged breach by Local 669 of no-strike clauses contained in agreements covering five specific projects. Under § 301, an employer is entitled to recover damages for a Union's failure to honor a no-strike commitment contained in a labor agreement. *See, e.g., John Morrell & Co. v. Local 304A, United Food and Commercial Workers*, 913 F.2d 544 (8th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991).

It is well settled, however, that an employer must first exhaust grievance and arbitration procedures provided by the applicable agreement before being entitled to bring a suit under § 301 of the LMRA based on an alleged violation of a no-strike clause. *See Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers Int'l*, 370 U.S. 254 (1962); *Pilot Freight Carriers, Inc. v. International Bhd. of Teamsters*, 659 F.2d 1252 (4th Cir. 1981). According to defendants, the projects in question are all covered by agreements which

contained terms providing for grievance and arbitration procedures when disputes arose involving alleged violations of no-strike clauses. There are five specific projects involved here.[12] As to one of those projects, plaintiff Grinnell has even filed a grievance which is still pending. No such grievance has been filed by Grinnell challenging the Union's right to strike at any of the other four projects.

Grinnell argues that grievance procedures contained in the agreements at issue here allow it to proceed directly with a suit in court alleging breaches of the no-strike clauses. Following its review of the terms of the agreements in question, this Court would disagree. Plaintiff Grinnell has the heavy burden of showing that it "may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). When determining whether a claim is subject to arbitration under a collective bargaining agreement, a court must resolve doubts in favor of arbitration. *Id.* Applying these principles here, this Court concludes that the language of each of the agreements at issue does in fact cover disputes based on Grinnell's claim that the Union violated no-strike clauses contained in the agree-

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[12] The projects in question were the Calvert Cliffs Nuclear Power Plant in Lusby, Maryland, the Onondago County Resource Recovery Facility in Onondago, New York, the Conemaugh Power Station in New Florence, Pennsylvania, the Selkirk II Project in Selkirk, New York and the Cooling Tower Project in New Martinsville, West Virginia.

ments. Evidence of record establishes that such grievances are in fact allowed under circumstances like those present here. For these reasons, the Court concludes that Grinnell has failed to exhaust its contractual grievance and arbitration remedies and thus cannot pursue in this Court its Section 301 claim asserted in Count Three.

Accordingly, defendants' motions for summary judgment will also be granted as to Count Three of the amended complaint.

D. Count Four - Labor Law Claim

In Count Four, plaintiff Grinnell alleges that Local 669, in violation of § 8(b)(4)(ii)(B) of the Act, engaged in a secondary boycott by picketing, strikes and coercion against the L.F. Driscoll Company ("Driscoll") in order to force Driscoll to cease doing business with Grinnell at another job site. This claim was not presented to the NLRB by way of an unfair labor charge against the Union. Rather, plaintiff Grinnell has asserted this claim in this Court under § 303 of the LMRA.

The claim alleged in Count Four relates to a picket line established by Local 669 on Friday, May 13, 1994 at a construction job in which Grinnell was engaged at the Philadelphia Children's Hospital. Driscoll was the general contractor, and Grinnell was one of the subcontractors. Because most employees of other trades at the job refused to cross the picket line, the project was effectively shut down on May 13, 1994. Driscoll then ordered Grinnell and other subcontractors to man the job. Driscoll also contacted Pat Gillespie, Business Manager of the Philadelphia Building Trades Council, and re-

quested that he obtain information concerning the dispute which Local 669 had with Grinnell.[13] To address the disruption of the project, Driscoll established a dual gate system[14] at the project and notified both Local 669 and its subcontractors. Local 669 directed its picket captain to honor the dual gate. For a short period of time on Monday, May 16, 1994, members of Local 669 began picketing at the project's main entrance However, this short period of improper picketing occurred prior to working hours, and when the picket captain arrived, the picketing was relocated to the proper gate. The picketing at the Hospital site lasted for only two days.

Meanwhile, Driscoll had been in contact with Gillespie who suggested to Driscoll that it not assign future work to Grinnell until Grinnell had settled its differences with Local 669. At the time, Driscoll had been engaged as the general contractor at another job in Philadelphia, the Spectrum II project. Grinnell was already performing work for Driscoll at the Spectrum II site and expected to be awarded the sprinkler subcontract. Driscoll was concerned that Local 669 would picket the Spectrum II project if Grinnell was awarded

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[13] The Philadelphia Building Trades Council is an association of construction unions in the Philadelphia area. Membership in the council is voluntary, and neither Local 669 nor United Association has ever been a member of the Council.

[14] Under a "dual" or "reserved" gate system, a separate gate is set aside at a construction site for use by the primary employer, and picketing must be confined to this gate. *See Markwell & Hartz, Inc. v. NLRB*, 387 F.2d 79 (5th Cir. 1967).

the sprinkler subcontract. The owner representative at the Spectrum II project was Fox Management Company ("Fox"). when Driscoll discussed the situation with Fox, Fox insisted that there be no labor disruptions at the Spectrum II project, and directed Driscoll to rebid the job unless Grinnell could guarantee that there would be no disruptions. Grinnell's representative indicated that no such assurances could be given. Because Grinnell could not guarantee that Local 669 would not strike the Spectrum II project, Driscoll subsequently engaged another sprinkler contractor to do the work which Grinnell was seeking to obtain.

Section 8(b)(4)(ii)(B) prohibits a union which has a dispute with a "primary" employer from pressuring a "secondary" employer who deals with the primary to stop such dealing. *See National Woodwork Mfrs Ass'n. v. NLRB*, 386 U.S. 612, 632-34 (1967). Grinnell contends that Local 669 threatened Driscoll with picketing unless Driscoll severed its business relationship with Grinnell. According to Grinnell, such threats caused it to lose the subcontract on the Spectrum II project. Grinnell argues that a threat like this one involving a neutral job site constitutes coercion prohibited by Section 8(b)(4)(ii)(B). *See, e.g., Local 456, Int'l Bhd. of Teamsters (Peckham Materials)*, 307 N.L.R.B. 612, 619 (1992).

In responding to these arguments, Local 669 contends (1) that the picketing in question was lawful; (2) that it had the right to advertise the fact that it was striking against Grinnell; (3) that Gillespie is not an agent of and did not speak for the Union; and (4) that since neither Gillespie nor a Union representative ever spoke with a representative of the owner, the Union

could not have caused the owner's decision to force Driscoll to award the sprinkler subcontract at the Spectrum II site to another sprinkler contractor. The record here fully supports these contentions. Plaintiff has not here produced evidence of unlawful coercion on the part of Local 669 in violation of the statute.

First, it is abundantly clear that the Union had the right to engage in a strike against Grinnell wherever Grinnell was or could be found. Thus, if Grinnell had been awarded the subcontract at the Spectrum II project, the Union could lawfully have called a strike at that location. This right was recognized by Grinnell's representative when he advised Fox that he could not guarantee that there would be no disruptions of work at the Spectrum II site if the job were awarded to Grinnell. The test for determining whether a union's picketing violates § 8(b)(4) was set forth by the NLRB in *Sailor's Union v. Moore Dry Dock Co.*, 92 N.L.R.B. 547 (1950), as follows:

> (1) whether the picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises; (2) whether at the time of the picketing the primary employer is engaged in normal business at the situs; (3) whether the picketing is limited to places reasonably close to the location of the situs; and (4) whether the picketing discloses clearly that the dispute is with the primary employer.

Evidence of record here indicates that the Union complied with all of these requirements.

Moreover, the Union had the right to advertise that it

had an ongoing dispute with Grinnell. A threat to engage in protected conduct does not amount to a violation of § 8(b)(4)(ii)(B). In *Storer Communications, Inc. v National Ass'n of Broadcast Employees & Technicians*, 854 F.2d 144 (6th Cir. 1998) , the Sixth Circuit upheld as lawful a union's calls to and visits to secondary employers. Since the Union had the right to picket Grinnell at the Spectrum II site, it was entitled under *Storer* to warn both Driscoll and the owner that such picketing would occur if Grinnell were awarded the job. Moreover, it was the owner and not Driscoll who made the decision that Grinnell should not be engaged as the sprinkler subcontractor and that the Spectrum II job should be rebid. The fact that the owner of the Spectrum II project was fearful of picketing by the Union and took the position that Grinnell should not be awarded the subcontract does not amount to unlawful coercion on the part of the Union. If the Union had the lawful right to notify such owner of its intention to picket Grinnell at the Spectrum II site, the decision of the owner that Driscoll should not engage Grinnell as a subcontractor does not make illegal the Union's act of so notifying the owner. Evidence therefore does not exist indicating that Local 669 was responsible for the alleged illegal secondary activity.

Grinnell's Count Four claim is principally based on its contention that Gillespie, in his contacts with Driscoll, was acting on behalf of Local 669. However, there is no evidence in this case that such an agency relationship existed. Local 669 was not a member of the Philadelphia Building Trades Council, and there is no evidence in this record that Local 669 authorized Gillespie to speak for it during this labor dispute. Gillespie was

indeed annoyed that an outside local union had picketed a site where Philadelphia locals were working and was threatening to picket another site. The efforts undertaken by him were in furtherance of the Council's representation of Philadelphia locals and were designed to ensure that such locals would not be subjected to work stoppages at the Spectrum II site. Grinnell argues that there is circumstantial evidence of such an agency relationship. This Court would disagree. The inferences relied upon amount to mere speculation and conjecture and are not sufficient to raise a genuine issue of disputed fact as to the agency issue.

For these reasons, defendants' motions for summary judgment will also be granted as to Count Four of the amended complaint.

V

Pendent Jurisdiction

Counts Five, Six and Seven of the amended complaint assert claims under state law. Since diversity jurisdiction does nct exist in this case,[15] this Court must consider those claims under the doctrine of pendent or supplemental jurisdiction.

Pendent jurisdiction, however, is a doctrine of discretion and not one of a plaintiff's right. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). The Supreme Court has expressly cautioned that "[n]eedless

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15 *See United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965).

decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal law claims are dismissed before trial . . . the state claims should be dismissed as well." *Id.* at 726. The principles of *Gibbs* have now been codified under the name "supplemental jurisdiction." 28 U.S.C. § 1367. A court may decline to exercise supplemental jurisdiction if all claims over which it has original jurisdiction have been dismissed. *See* 28 U.S.C. § 1367(c)(3); *Shanaghan v Cahill*, 58 F.3d 106, 110 (4th Cir. 1995). In this particular case, defendants' motions for summary judgment have been granted as to all the federal claims asserted by plaintiff against them.

Most courts which have considered the question have declined to exercise pendent jurisdiction over state claims when the federal claims have been disposed of prior to a full trial on the merits. *See, e.g., Hector v. Weglein*, 558 F. Supp. 194, 204-05 (D. Md. 1982). Outlining the relevant factors to be considered in determining the appropriateness of a court's exercise of its discretion to decide pendent state claims, Judge Friendly in *Kavit v. A. L. Stamm & Co.*, 491 F.2d 1176, 1180 (2d Cir. 1974) said the following:

> If it appears that the federal claims . . . could be disposed of on a motion for summary judgment under F.R.Civ.P. 56, the court should refrain from exercising pendent jurisdiction absent exceptional circumstances.

Since defendants' motions for summary judgment have been granted as to the four federal claims asserted by plaintiff in this case and since there are no excep-

tional circumstances here, this Court will not exercise supplemental jurisdiction over the claims asserted by plaintiff under state law in Counts Five, Six and Seven of the amended complaint. These claims will therefore be dismissed without prejudice.

V.

Conclusion

Since defendants' motions for summary judgment are being granted as to Counts One, Two Three and Four of the amended complaint and since Count Five, Six and Seven are being dismissed without prejudice, plaintiff's motion for partial summary judgment will be denied. An appropriate Order will be entered by the Court.

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Senior United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1855
CA-949-3309-H

GRINNELL CORPORATION

Plaintiff-Appellant

v.

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

Defendants-Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Filed: February 18, 1998

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK

Supreme Court, U.S.
FILED
AUG 3 1998
CLERK

No. 97-2040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GRINNELL CORPORATION,
Petitioner,
v.
ROAD SPRINKLER FITTERS LOCAL UNION NO. 669; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A.F.L.-C.I.O.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The opinions below, the basis of this Court's jurisdiction, and the statutory provisions involved are set out at page 1 of the petition for a writ of *certiorari*.

STATEMENT OF THE CASE

The Fourth Circuit—Circuit Judges Luttig and Motz and District Judge James P. Jones, by designation—in its *per curiam* decision (unpublished), affirming the District Court's summary judgment decision in all respects, succinctly states the basis of Grinnell Corporation's antitrust claims, the District Court's ruling on those claims and the Court of Appeals' ruling on Grinnell's appeal. We therefore adopt the essentials of that decision as our statement.

The Court of Appeals first set out the identity of the parties, the procedural setting of the case and the gravamen of Grinnell's antitrust claims:

> Grinnell Corporation, a designer, manufacturer, and installer of fire sprinkler systems, has for years engaged in a fiercely-contested labor dispute with the Road Sprinkler Fitters Local Union No. 669 and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. While that case was pending before the National Labor Relations Board (NLRB), Grinnell brought this action against the local and national union alleging, in a seven count complaint, various antitrust, labor law, and state tort claims.
>
> After two years of extensive discovery, the parties filed dispositive summary judgment motions. . . . [T]he district court . . . granted the defendants' motions for summary judgment on the antitrust and labor law claims and dismissed the state law claims. . . .

> Grinnell's principal contention, alleged in Count I of its complaint, is that defendants conspired with the National Fire Sprinkler Association (NFSA), a trade association to which Grinnell belongs and to which prior to September, 1993, it had assigned its collective bargaining rights, to engage in activity amounting to an illegal restraint of trade under Section 1 of the Sherman Act. *See* 15 U.S.C.A. § 1 (West 1997). Grinnell asserts that defendants and NFSA conspired to withdraw the availability of a job program known as targeting from Grinnell in order to force Grinnell to reassign its bargaining rights to NFSA. Under this program, a contractor and the local union would negotiate concessionary rate agreements as to an individual project in a particular geographical area so the contractor might be able to compete with lower-cost, nonunion contractors. Grinnell also claims that, in an effort to standardize contract terms and employment conditions within the sprinkler industry, the defendants and NFSA conspired, during the course of negotiating their collective bargaining agreement, to prevent Grinnell from obtaining more favorable collective bargaining terms. [Pet. App. 2a-4a.]

The Court of Appeals went on to note that, in granting summary judgment on these claims.

> Judge Harvey explained that "[t]he record discloses as a matter of law first that defendant Local 669 acted unilaterally in withdrawing from Grinnell the right to participate in the job targeting program and second that the Union and the NFSA did not illegally conspire during their collective bargaining to prevent Grinnell from obtaining more favorable bargaining terms." Moreover, the judge further concluded, "assum[ing] *arguendo*, that there is a dispute of material fact as to the existence of a conspiracy between the NFSA and the Union," the non-statutory labor exemption from antitrust liability shielded the alleged restraint. [Pet. App. 4a-5a.]

The Court of Appeals then concluded as follows:

> On appeal, Grinnell repeats the arguments made below, asserting that the district court ignored evidence supporting its claims. After a painstaking review of the record, as well as consideration of the briefs, relevant statutes, case law, and the oral arguments of the parties, we conclude that Judge Harvey's assessment of the evidence was accurate and his rulings correct. Accordingly, we affirm on the basis of the careful reasoning of the district court. [Pet. App. 5a-6a.]

ARGUMENT

I.

The first question petitioner Grinnell Corporation raises—"Whether the court of appeals erred in imposing a heightened proof standard for antitrust conspiracy claims at the summary judgment stage that is in direct conflict with the standards adopted by other circuits," Pet. i—is *not*, in fact, presented by this case.

The District Court's summary judgment findings rest on classic, *general* Rule 56 Fed.R.Civ.Pro. summary judgment principles and *not* on any "heightened proof standard for anitrust conspiracy claims."

Moreover, Grinnell—in appealing to the Fourth Circuit from the District Court's grant of summary judgment on Grinnell's antitrust conspiracy claims—did *not* make *any* "erroneous proof standard" challenge to the District Court's ruling, much less the "erroneous heightened proof standard for antitrust claims" contention raised in the *certiorari* petition as Question 1.

And, in any event, the Fourth Circuit's developed "proof standard[s] for antitrust conspiracy claims" belie Grinnell's contention that the Court of Appeals imposes any such "erroneous heightened proof standard."

On each of these grounds—which we now develop—Grinnell's request for review by this Court falls far short and should be denied.

(a) It is Grinnell's principal submission, in support of its *certiorari* petition, that the Fourth Circuit erred by "interpreting" the second, antitrust-law-specific portion of the summary judgment discussion in *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574 (1986)

> to mandate dismissal of antitrust conspiracy claims whenever the plaintiff's evidence at the summary judgment stage is consistent with inferences of both conspiracy and innocent conduct. Under this interpretation, *Matsushita*'s rigorous standard applies regardless of the plausibility of the plaintiff's theory or the nature of the alleged misconduct. [Pet. 12].[1]

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[1] In *Matsushita*, this Court—in discussing the propriety of the entry of summary judgment in that § 1, Sherman Act antitrust conspiracy case—first noted the following basic Rule 56 principles:

> To survive petitioners' motion for summary judgment, respondents must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. Fed. Rule Civ. Proc. 56(e); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-289 (1968) . . . [T]he issue of fact must be "genuine." Fed. Rules Civ. Proc. 56(c), (e). When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. *See DeLuca v. Atlantic Refining Co.*, 176 F.2d 421, 423 (CA2 1949) (L. Hand, J.), *cert. denied*, 338 U.S. 943 (1950) . . . In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a *genuine issue for trial.*" Fed. Rule Civ. Proc. 56(e) (emphasis added) . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *Cities Service, supra*, at 289. [475 U.S. at 585-587.]

Then, with specific reference to the antitrust laws, the *Matsushita* Court added the following with regard to situations in which a plaintiff, in opposing a defendant's motion for summary judgment, relies on "ambigous evidence" from which, says the plaintiff, "permissible inferences" of an "illegal conspiracy" can be drawn:

> Respondents correctly note that "[on] summary judgment the inferences to be drawn from the underlying facts . . . must be

That submission avails Grinnell nothing for the most straightforward of reasons—this case was decided on the well-settled general summary judgment principles discussed in *Matsushita*, and in a manner that pretermitted any need to apply the *Matsushita* antitrust law standard for evaluating "ambiguous evidence" regarding an "illegal conspiracy." Grinnell's effort to dress up this garden-variety undisputed fact case as one turning on some sophisticated and disputed antitrust law standard of proof is made out of whole cloth.

The District Court's careful opinion—thoroughly analyzing the "massive record" generated by the "voluminous discovery" undertaken below, Pet. 20a—makes it plain that the District Court proceeded by applying the generally applicable requirements of Rule 56(c), and without the need to reach any special antitrust law standard of proof.

On the parties' cross motions for summary judgment, the District Court properly allocated to the defendant Unions as moving parties "the burden of showing the absence of any genuine issue of material fact" and the burden of demonstrating the *"absence of evidence* to support the nonmoving party's case" in order to prevail. Pet. App. 16a, citations omitted, emphasis added. And,

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viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id.*, at 764. *See also Cities Service, supra*, at 280. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. 465 U.S. at 764. [475 U.S. at 587-588.]

the District Court, viewing the record "in the light most favorable to [Grinnell] the party opposing the motion," Pet. App. 17a, concluded that Grinnell had failed to make even "the necessary *minimal* showing . . . that the defendant may be liable." Pet. App. 17a, emphasis added.

As for Grinnell's "job targeting conspiracy" claim, the District Court first recognized the undisputed discretionary nature of the Union targeting program, which Grinnell had expressly conceded:

> The Union had always reserved to itself the right in its discretion to permit targeting by a particular contractor or to deny targeting to a particular class of contractors. There had never been an agreement between the NFSA and the Union which prohibited the Union from restricting the application of targeting to particular contractors. [Pet. App. 26a and n.8.]

With respect to the exclusion of Grinnell from the Union targeting program in November of 1993, the District Court found that the undisputed evidence established that

> [w]ith bargaining for a new contract about to commence, the Union *unilaterally* decided to extend the targeting program only to those employers who signed an Assent and Interim Agreement or who agreed to be represented by the NFSA for future bargaining. [Pet. App. 25a, emphasis added.]

In so doing the District Court relied upon the substantial affirmative and unrefuted record evidence submitted in support of the Unions' motion for summary judgment:

> According to the testimony of all Local 669 witnesses and all NFSA witnesses, the NFSA did not participate in any way in the decision to reimpose in November the conditions which had to be met by contractors if they were to participate in targeting. [Pet. App. 26a.]

Equally to the point the District Court found as follows with regard to Grinnell's "proof":

> Grinnell seeks to derive inferences from various facts of record in support of its contention that proof of an illegal conspiracy exists in this case. But these inferences are *so tenuous as to amount to no more than speculation and conjecture.* . . . They do not "fall within the range of reasonable probability" so as to create a jury issue as to plaintiff's claim that the Union conspired with the NFSA to withdraw targeting from Grinnell. [Pet. App. 26a-27a, citations omitted, emphasis added.]

As for Grinnell's alternative "conspiracy theory," alleging preclusion of independent collective bargaining, the District Court again concluded that the record evidence—including the parties' bargaining notes and the transcript and exhibits from a 22 day N.L.R.B. unfair labor practice hearing growing out of the same events—provided *no* support for "[Grinnell's] conten[tion] that Local 669 and the NFSA agreed that Grinnell would not receive a more favorable agreement than the one negotiated between these parties." Pet. App. 29a. After searching that record the District Court concluded:

> But *evidence does not exist* that any such agreement was ever reached. Although the NFSA pressed hard for inclusion of a most favored nation clause in the agreement, the demand was eventually dropped and was not included as a part of the final collective bargaining agreement reached between the Union and the NFSA. Moreover, during negotiations with Grinnell, the Union did not even insist that the terms and conditions of the Grinnell agreement be the same as those contained in the NFSA agreement.
>
> The Union at all times remained flexible in its bargaining sessions with Grinnell, and indeed, some of the wage concessions made were more favorable to Grinnell than those contained in the agreement

> reached with the NFSA. [Pet. App. 29a, emphasis added.]

Grinnell's inability to controvert the Unions' factual assertions for summary judgment purposes left the District Court with no alternative other than to dismiss the allegation:

> [*E*]*vidence* does not exist that the Union conspired during its bargaining with the NFSA to prevent Grinnell from obtaining more favorable terms than those contained in the collective bargaining agreement reached between the Union and the NFSA. [Pet. App. 27a-28a, emphasis added.]

(b) It is equally fatal to Grinnell's *certiorari* petition that Grinnell made *no* claim to the Fourth Circuit that the grant of summary judgment to the Unions and against Grinnell's antitrust conspiracy claim was in error and should be reversed because that summary judgment rested in whole or in part on an "erroneous heightened proof standard for antitrust conspiracy claims." Both in its original submissions to the Fourth Circuit and on rehearing, Grinnell's only claim was instead that the District Court had "ignored evidence supporting its claims." Pet. App. 5a; Appellant's Brief at 8-9; Petition for Rehearing at 1. Indeed, in stating the governing principles, Grinnell treated the Fourth Circuit's decisions that do turn on, and explicate, *Matsushita's* discussion of the proper antitrust-law-specific summary judgment approach to ambiguous evidence regarding an illegal conspiracy as entirely correct. Appellant's Reply Brief at 11-12.

Thus, even assuming that the "heightened proof standard" issue were somehow relevant to the decision of this case, it is far too late in the day for Grinnell to raise this issue in this Court for the first time. For the Court will not consider, as a question presented for *certiorari*, an issue that was "neither raised nor considered by the Court of Appeals." *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 147 n.2 (1970) (citations omitted). And, the "routine restatement and application of settled law" gov-

erning antitrust case summary judgments by the Fourth Circuit here, *see* Pet. App. 4a, where there was no "real contest" on the point, does *not* suffice to preserve the issue for *certiorari*. *Illinois v. Gates*, 462 U.S. 213, 222-223, (1983). *See also, e.g., Auer v. Robbins*, 519 U.S. 452, ——, 117 S.Ct. 905, 912 (1997).

(c) While we believe the foregoing is dispositive, we would be derelict if we failed to point out that Grinnell, in its need to try to create the appearance of disarray in the court of appeals law on *Matsushita's* antitrust-law-specific summary judgment approach tortures the relevant Fourth Circuit jurisprudence beyond recognition.

The most recent full Fourth Circuit statement of the governing summary judgment principles in antitrust cases is set out in *Thompson Everett, Inc. v. National Cable Advert. L.P.*, 57 F.3d 1317 (4th Cir. 1995), upon which the District Court, Pet. App. 18a-19a, and the Fourth Circuit, Pet. App. 4a, relied below. In that case, the plaintiff-appellant argued that the district court had erred in granting summary judgment to the defendant-appellee by "yielding too readily to the defendants because of a mistaken belief that such preference should be given in antitrust cases." 57 F.3d at 1322.

The Fourth Circuit, in rejecting that contention, responded by setting out the proper practice on such summary judgment motions:

> While Rule 56 is to be applied to antitrust cases no differently from how it is applied to other cases, that is not to say that the summary judgment device is not an appropriate and useful tool for resolving antitrust cases. On the contrary, because of the unusual entanglement of legal and factual issues frequently presented in antitrust cases, the task of sorting them out may be particularly well-suited for Rule 56 utilization. The summary judgment practice does not become disfavored simply because a case is com-

> plex. Rather, it is favored as a mechanism to secure the "just, speedy and inexpensive determination" of a case, *see* Fed.R.Civ.P. 1, when its proper use can avoid the cost of trial. *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). While it is axiomatic that Rule 56 must be used carefully so as not improperly to foreclose trial on genuinely disputed, material facts, the mere existence of some disputed facts does not require that a case go to trial. The disputed facts must be material to an issue necessary for the proper resolution of the case, and the quality and quantity of the evidence offered to create a question of fact must be adequate to support a jury verdict. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Thus, if the evidence is "merely colorable" or "not significantly probative." it may not be adequate to oppose entry of summary judgment. *Id.* at 249-50. [57 F.3d at 1322-1323.]

As to the drawing of inferences from the record evidence the Court of Appeals added:

> While we have recognized generally that when considering a motion for summary judgment, the district court must "draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion," *Tuck v. Henkel Corp.*, 973 F.2d 371, 374 (4th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 1276, 122 L.Ed.2d 671 (1993), we hasten to add that those inferences must, in every case, fall within the range of reasonable probability and not be so tenuous as to amount to speculation or conjecture. *See Sylvia Development Corp. v. Calvert County*, 48 F.3d 810, 817 (4th Cir. 1995). Moreover, the inferences which may be drawn vary from one substantive area of the law to another. Thus, on summary judgment motions in antitrust cases, the Supreme Court has instructed that when there is evidence of conduct that is consistent with both legitimate competition and an illegal conspiracy, courts may not infer that

> an illegal conspiracy has occurred without other evidence. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).
>
> At bottom, the district court must determine whether the party opposing the motion for summary judgment has presented genuinely disputed facts which remain to be tried. [57 F.3d at 1323.]

The foregoing, we submit, makes it perfectly plain that, contrary to Grinnell's submission, the Fourth Circuit has not read *Matsushita* as a license to adopt a special "rigorous and restrictive" antitrust summary judgment standard. Rather, consistent with *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 541, 468-469 (1992), the Fourth Circuit recognizes that *Matsushita* "did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases" and "demands only that the nonmoving party's inferences be reasonable in order to reach the jury. . ." [2]

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[2] Grinnell similarly overreads the Seventh Circuit case law. Grinnell cites *Serfecz v. Jewel Food Stores*, 67 F.3d 591 (7th Cir. 1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 1042 (1996) as the most recent Seventh Circuit case reading *Matsushita* as authorizing the "impos[ition of] a heightened evidentiary burden" on antitrust plaintiffs opposing summary judgment. Pet. 13-14. But *Serfecz* imposes no such burden. Rather the *Serfecz* decision, like the Fourth Circuit's *Thompson Everett* decision, gives *Matsushita* a straightforward reading consistent with basic Rule 56 principles:

> The evidence of record fails to show that, if the case were submitted to a trier of fact, there would be sufficient evidence to justify a judgment for the plaintiffs. Although, at the summary judgment stage, we must evaluate the record so as to give the nonmoving party the benefit of the doubt on all reasonable inferences that may be drawn from that record, we are not permitted to allow a case built on a metaphysical doubt to go to the jury. *Matsushita*, 475 U.S. at 586-87. Here the plaintiffs' case is built on a metaphysical doubt on a metaphysical doubt. There is simply no evidence that precludes the possibility of independent action. *Id.* at 597 n.21. In this context, the absence of that evidence deprives the plaintiffs of a reasonable

What this case comes down to in this regard, as both the District Court and Court of Appeals held—after the most careful scrutiny of the record—is that there is *no* record evidence of the alleged combination or conspiracy

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case that would support a jury verdict. *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1000-01 (3d Cir. 1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 1691, (1995); *see Eastman Kodak*, 504 U.S. at 468-77. [67 F.3d at 602]

Indeed, while Grinnell claims that the Seventh Circuit antitrust summary judgment decisions are in "direct contrast" with those of the Third Circuit, *Serfecz* (as the foregoing quotation shows) cites with approval, and follows, the most recent Third Circuit decision in point—*Alvord-Polk, Inc. v. F. Schumacher & Co., supra*, (cited by Grinnell at Pet. 16).

Grinnell seeks to make much of the Eighth Circuit's rejection of the plaintiff argument that *Matsushita*'s antitrust-law-specific summary judgment approach "does not apply . . . [where] the conspiracy . . . allege[d] served defendants' economic interest"—on the ground that the Eighth Circuit "read[s] *Matsushita* more broadly." *Corner Pocket of Sioux Falls v. Video Lottery*, 123 F.3d 1107, 1109 (8th Cir. 1997), *cert. denied, sub nom. Corner Pocket of Sioux Falls v. Powerhouse Technologies*, —— U.S. ——, 118 S.Ct. 1054 (1998). But this portion of *Corner Pocket* does not show that the Eighth Circuit has adopted the "heightened evidentiary burden" reading of *Matsushita* Grinnell attributes to that court. All *Corner Pocket* (and its precursors) do is hold, quite unexceptionably, that "where the objectively observable market conditions are consistent with defendant's assertions . . . that [the defendant] acted unilaterally . . . and independently . . . absent additional evidence of concerted action, the market conditions emphasized by plaintiffs do not prove that 'the inference of conspiracy is reasonable in light of the competing inference[] of independent action.'" 23 F.3d at 1112 *quoting Matsushita*, 475 U.S. at 588. That holding all but tracks *Matsushita* rather than adding to it.

Grinnell's attempt to create a circuit conflict out of *In Re Coordinated Pretrial Proceedings*, 906 F.2d 432 (9th Cir. 1990) is equally faulty. Grinnell emphasizes that the Ninth Circuit rejected the proposition that *Matsushita* "suggest[s] that a district court may grant summary judgment to antitrust defendants whenever the court concludes that inferences of conspiracy and inferences of innocent conduct are equally plausible," 906 F.2d at 438—a proposition not adopted by any court of appeals. And, Grinnel does so in order to suggest that the Ninth Circuit gives *Matsushita* a narrower scope than other circuits. Grinnell is much more reticent in

that generates any such *"reasonable . . . inferences."* And, this Court does not sit to review careful district court factfindings carefully reviewed and affirmed by a court of appeals. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1937) ("granting of the writ would not be warranted merely to review the evidence or inferences drawn from it"); *Rudolph v. U.S.*, 370 U.S. 269, 270 (1962) (dismissing writ of *certiorari*, and stating that, where the appellate court approved the district court's findings of fact, "their review [by the Court] would be of no importance save to the litigants themselves.")

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quoting the Ninth Circuit's statement of what *Matsushita* does "suggest." And, for the most obvious reason—what the Ninth Circuit said in that regard is directly in line with the rest of the court of appeals case law:

> Thus, *Matsushita* establishes that a trial judge should not permit an inference of antitrust conspiracy from circumstantial evidence where to do so would have the effect of deterring significant procompetitive conduct. We emphasize, however, that an antitrust defendant is not entitled to summary judgment simply by virtue of the fact that the plaintiff's inference of conspiracy would have *some* deterrent effects; the effects must be significant. As the Court stated in *Matsushita*, the concern with avoiding deterrent effects "must be balanced against the desire that illegal conspiracies be identified and punished." 475 U.S. at 594. In short, the trial court must consider whether, on the evidence presented, the protection of innocent independent conduct outweighs the costs associated with the potential decrease in strict antitrust enforcement. If it does, then the plaintiff must come forward with additional, "sufficiently unambiguous" evidence that does not have these undesirable deterrent effects. *Id.*, at 597-98 & n.21. [906 F.2d at 439; *see also id.* at 440 and 447]

The sum of the matter is that taking into account the nuances created by natural differences in judicial writing styles, the courts of appeals restatements of, and elaborations on, *Matsushita* are, in their essentials, remarkably uniform. Certainly there are no differences that come anywhere close to creating a circuit conflict. Thus, Grinnell's conflict argument is doubly defective—it pertains to an issue not presented by this case and it is unsound in its own terms.

II.

As secondary grounds for the grant of its *certiorari* petition, Grinnell argues that the District Court misunderstood and misapplied the nonstatutory labor exemption to the antitrust laws as well as the substantive requirements of a *Pennington* antitrust claim.

Grinnell contends first that the District Court's determination that the nonstatutory exemption applies to the Unions' unilateral "job targeting" allocation decisions is inconsistent with the proper test for applying the exemption stated in *Mackey v. National Football League,* 543 F.2d 606, 614 (8th Cir. 1976). Pet. 20-22.

Second, Grinnell posits that, in abiding by this Court's instruction, in *Brown v. Pro Football, Inc.,* 518 U.S. 231, 245-250 (1996), not to second-guess the subjective motives of parties in collective bargaining, the District Court transgressed the principles enunciated in *United Mine Workers v. Pennington,* 381 U.S. 657 (1965). Pet. 22-25.

And, third, Grinnell claims that the District Court erred in stating the requirements of an actionable *Pennington* antitrust claim. Pet. 25-29.

Grinnell is wrong in each regard, and it follows that neither the nonstatutory exemption question raised in the *certiorari* petition nor the *Pennington* question is worthy of this Court's review.

(a) Rather than departing from the *Mackey v. National Football League* nonstatutory labor exemption test, as Grinnell claims, the District Court *expressly followed Mackey*:

> The test to be applied in a case such as this one is that recognized by several circuit courts. Under that test, the parties to an agreement restraining trade are exempt from antitrust liability if (1) the restraint primarily affects the parties to the agree-

> ment and no one else; (2) the agreement concerns wages, hours or conditions of employment that are mandatory subjects of collective bargaining, and (3) the agreement is produced from *bona fide* arms-length collective bargaining. *Phoenix Elec. Co. v. National Elec. Contractors Ass'n*, 81 F.3d 858, 861 (9th Cir. 1996); *Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir. 1976). [Pet. App. 32a.]

Applying that test to Grinnell's hypothetical conspiracy between the Unions and NFSA to withdraw targeting from Grinnell—*a conspiracy Grinnel was in any event unable to prove*—the District Court expressly found the three *Mackey* factors to be present. Pet. App. 32a-33a.

That Grinnell finds fault with the District Court's application of the *Mackey* test to the particular facts of this case does not establish a circuit conflict or create an issue of law for this Court's consideration. Indeed, the Eighth Circuit itself recently applied its *Mackey* test to uphold a union targeting program against antitrust claims. *See Local Union 257, Int'l Bhd. of Elec. Workers v. Sebastian Elec.*, 121 F.3d 1180, 1186 (8th Cir. 1997). And in this regard, the Eighth Circuit followed the lead of the Ninth Circuit in *Phoenix Elec. Co. v. National Elec. Contractors Ass'n, supra* (targeting program protected by nonstatutory exemption).

(b) Grinnell's claim that this Court's decisions in *Brown v. Pro Football League* and *Pennington* are somehow inconsistent and that the District Court's citation, and application, of *Brown* to a *Pennington* antitrust claim undermines the *Pennington* decision is insubstantial.

The *Brown* Court cautioned district courts sitting in antitrust cases not to second-guess the "true purpose" or "subjective motive" of a party engaged in collective bargaining. 518 U.S. at 245-250. As the District Court recognized, that caution is perfectly consistent with *Pennington's* holding that the labor exemption does not apply

when it is "clearly shown" that a union has agreed with one set of employers to impose a particular wage scale on others while recognizing that it is "beyond question" that a union may conclude a wage agreement with a multiemployer group and, as a matter of its own policy, seek the same wages from others. 381 U.S. at 663.

Thus, under *Brown* and *Pennington*, correctly read, the District Court properly rejected Grinnell's invitation to divine some hidden agenda in the collective bargaining negotiations between the Unions and NFSA, in the *absence of any evidence* suggesting such an agenda. The District Court repeatedly noted that evidence simply "does not exist" that the Unions conspired with NFSA in bargaining to deny more favorable terms to Grinnell. Pet. App. 27a, 29a, 30a.

(c) Grinnell is on no stronger ground in attacking the District Court's reliance on *Smitty Baker Coal Co. v. United Mine Workers*, 620 F.2d 416 (4th Cir. 1980) in defining an actionable *Pennington* anti-trust combination or conspiracy to impose terms and conditions on third party employers through collective bargaining.[3]

Smitty Baker rests on a painstaking review of the three-part decision in *Pennington* as well as the post-*Pennington* judicial authority and commentary, and on the basis of that review, concludes

> To amount to an antitrust violation the agreement must be rooted in an anti-competitive purpose, and must effect an anti-competitive result, as evidenced by action "ruining" a competitor's business or driving him "out of business." [620 F.2d at 431-32.]

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[3] While we treat with Grinnell's *Pennington* claim question on its merits in text we emphasize that in the context of this case that question is entirely hypothetical. The District Court found as a fact that "evidence does *not* exist that any [Union-NFSA] agreement [to impose terms and conditions on Grinnell] was ever reached." Pet. App. 29a.

In recognizing this "predatory intent" element, *Smitty Baker* follows the lower courts' reading and application of *Pennington* on remand. *See Lewis v. Pennington*, 400 F.2d 806, 813-14 (6th Cir.), *cert. denied*, 398 U.S. 960 (1968). And as Grinnell acknowledges, "the Fifth, Sixth and Seventh Circuits have likewise held that substantive claims under *Pennington* require a showing of predatory intent to drive the competitor out of business. Pet. 26, n.8. *See, e.g., James R. Snyder Co. v. Associated Gen. Contractors of Am.*, 677 F.2d 1111, 1120 (6th Cir. 1982); *Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc.*, 504 F.2d 896, 903 (5th Cir. 1974); *Associated Milk Dealers, Inc. v. Milk Drivers Union*, 422 F.2d 546, 554 (7th Cir. 1970).

We know of no court of appeals decision to the contrary. *Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council*, 670 F.2d 421 (3d Cir. 1982)—the one case cited by Grinnell as such—is inapposite. As the Third Circuit noted in its earlier opinion in that litigation, the *Muko* case was predicated on antitrust claims *arising wholly outside of a collective bargaining relationship. See Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council*, 609 F.2d 1368, 1373 (3d Cir. 1979).

So far as our researches and those of Grinnell show, then, the courts of appeals are in complete accord on the proper reading and application of *Pennington* to alleged antitrust combinations or conspiracies to impose terms and conditions on third party employers through collective bargaining. Accordingly, the decision below in this regard raises no question for review in this Court.

CONCLUSION

The petition should be denied.

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No. 97-2040

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

GRINNELL CORPORATION,

Petitioner,

v.

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669;
UNITED ASSOCIATION OF THE PLUMBING AND PIPEFITTING
INDUSTRY OF THE UNITED STATES AND CANADA,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

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Respondents have failed to offer any persuasive response to Grinnell's showing that this Court's review is necessary and appropriate in this case. The decision below raises recurring issues of law that have divided the circuits, and decides important federal questions in a manner that is irreconcilable with controlling decisions of this Court. For the reasons set forth below and in the petition, certiorari should be granted.

I. REVIEW IS WARRANTED TO RESOLVE THE WIDENING CIRCUIT CONFLICT OVER THE PROPRIETY OF THE HEIGHTENED PROOF STANDARD APPLIED BELOW

As Grinnell explained in its petition, the question whether *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), imposes a heightened proof standard at the summary judgment stage in all antitrust conspiracy cases is an important and recurring question that has divided the circuits. All but conceding the certworthy nature of that question, respondents instead go to great lengths in an attempt to deny that this case presents that issue. *See* Br. in Opp. 3-13. Respondents' efforts are of no avail, however, because both courts below expressly applied the very standard that gives rise to the circuit conflict.

A. The Question Whether *Matsushita* Imposes A Heightened Proof Requirement In All Antitrust Conspiracy Cases Is Properly Presented In This Case

1. Respondents selectively quote at length from the opinion of the district court (*see* Br. in Opp. 6-8) in support of their assertion that "this case was decided on . . . well-settled general summary judgment principles" rather than the heightened "*Matsushita* antitrust law standard for evaluating 'ambiguous evidence' regarding an 'illegal conspiracy.'" *Id.* at 5. Strikingly, however, respondents' liberal use of quotations does not extend to the district court's statement of the summary judgment standard it felt bound to apply in this case. Indeed, nowhere in respondents' brief

is there any acknowledgement of that statement, which the district court set forth in the clearest possible terms. The language omitted from respondents' brief is worth repeating here, because it removes any possible doubt about whether the district court applied the Fourth Circuit's heightened proof requirement in evaluating the evidence put forward by Grinnell: "To avoid the entry of summary judgment against it in an antitrust case on the ground that proof of conspiracy does not exist, . . . the plaintiff must 'bring forth evidence that *excludes the possibility* that the alleged coconspirators acted independently or based on a legitimate business purpose.'" Pet. App. 22a-23a (quoting *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 543 (4th Cir. 1991)) (emphasis added).

Likewise, and more importantly, the decision that this Court would actually be reviewing -- that of the court of appeals -- is equally explicit in announcing the heightened summary judgment standard against which Grinnell's evidence was inappropriately measured. The court of appeals expressly reiterated its heightened proof standard for antitrust conspiracy claims in its opinion below, stating that "to survive a summary judgment motion an antitrust plaintiff must . . . 'bring forward evidence that *excludes the possibility* that the alleged co-conspirators acted independently or based on a legitimate business purpose.'" Pet. App. 4a (quoting *Laurel Sand & Gravel*, 924 F.2d at 542-43) (emphasis added). Lest any doubt remain on that score, the court of appeals also emphasized that, in keeping with its interpretation of *Matsushita*, "conduct as consistent with permissible competition as with illegal conspiracy, does not, standing alone, support an inference of anti-trust conspiracy." Pet. App. 4a.

Thus, contrary to respondents' assertions, it is unambiguously clear on the face of the opinions below that both the district court and the court of appeals announced and adhered to the heightened summary judgment standard at

issue in Grinnell's petition.[1] To be sure, the district court examined the record evidence in light of this standard and purported to find it lacking, but that fact does not militate against review. The key point is that the rule of law applied by the courts below in granting summary judgment was unduly stringent, and conflicts with the approach followed by other courts of appeals.[2]

2. Respondents next contend (Br. in Opp. 8-9) that Grinnell is precluded from challenging the Fourth Circuit's heightened proof requirement because this issue was not briefed below. Respondents' contention is without merit.

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1 Respondents' claims to the contrary are belied both by the language used in the opinions below and by respondents' brief in the court of appeals, which (in contrast to their brief in opposition in this Court) was laced with repeated references to, and heavy reliance on, the heightened proof standard enunciated by the Fourth Circuit in *Laurel Sand & Gravel*. *See, e.g.*, Resp. C.A. Br. 15 (quoting *Laurel Sand* standard), 16 (citing *Laurel Sand* for the proposition that affirmance would be required "if Grinnell has failed to rule out a 'possible and plausible' legitimate explanation" for defendants' conduct, even if "inferences of concerted illegal activity could arguably be drawn" from the evidence), 29 (arguing that Grinnell's claim "cannot survive the application of the *Laurel Sand & Gravel* twofold evidentiary burden"), 32 (asserting that "Grinnell's purported proof . . . does not satisfy the *Laurel Sand & Gravel* standard").

2 Grinnell will not attempt to address respondents' various mischaracterizations of the record evidence that supports Grinnell's claims, other than to note that, as demonstrated in the petition (Pet. 2-7), the evidence was more than sufficient to preclude entry of summary judgment when measured against traditional summary judgment principles. Contrary to respondents' implication (Br. in Opp. 12-13), Grinnell is not asking this Court to review the lower courts' weighing of the evidence against the standard applied below; rather, Grinnell asks this Court to hold that the court of appeals (and the other circuits that follow a similar approach) erred as a matter of law in imposing a heightened proof requirement in all antitrust conspiracy cases.

For obvious reasons, Grinnell did not ask the three-judge panel that heard this case to overrule binding Fourth Circuit precedents mandating a heightened proof standard in antitrust conspiracy cases. That standard has been applied repeatedly by the court of appeals in prior cases (*see* Pet. 12-13), and Grinnell had no alternative but to acknowledge that fact in the courts below.[3] It would be absurd, and inconsistent with this Court's supervisory role, to hold that review of a particular circuit's long-established rule of law is precluded unless the petitioner has engaged in the pointless endeavor of asking the panel below to overturn controlling circuit precedent.

Not surprisingly, this Court has expressly refused to limit the scope of its review in the manner suggested by respondents. To the contrary, the Court has repeatedly made clear that it will consider questions of federal law that were *either* "pressed" *or* "passed upon" in the court below. As the Court explained in *United States v. Williams*, 504 U.S. 36 (1992), "Our traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.' . . . . That *this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon*, is illustrated by some of our more recent dispositions." *Id.*

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[3] Grinnell did assert below, however, that summary judgment procedures should be used only "'sparingly in complex antitrust litigation'" and that "'[a]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter.'" Pet. C.A. Br. 10 (quoting *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). Moreover, Grinnell argued that the district court violated these principles by "decid[ing] factual issues that should have been reserved for the jury." Pet. C.A. Br. 11. Thus, contrary to respondents' implication, Grinnell (while acknowledging the Fourth Circuit's heightened proof standard, as it was required to do) did not embrace that heightened standard.

at 41 (citing cases; emphasis added). *See, e.g., Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("Respondents argue that this issue was not raised below. . . . *It suffices for our purposes that the court below passed on the issue presented*, particularly where the issue is, we believe, "'in a state of evolving definition and uncertainty,"' and one of importance to the administration of federal law.") (citations omitted; emphasis added).[4]

As discussed above, there is no doubt that the court of appeals "passed upon" the question of the summary judgment standard applicable to this case, and chose to apply the Fourth Circuit's heightened proof requirement for antitrust conspiracy claims. Under this Court's settled practice, that fact suffices to preserve the issue for review.

B. The Summary Judgment Standard Applied By The Court Of Appeals Below Conflicts With The Standards Applied By Other Circuits

1. Respondents attempt to dispute the fact that the Fourth Circuit has adopted a heightened proof requirement for antitrust conspiracy cases. Br. in Opp. 9-11. Respondents' assertion in this regard is at best odd, given their heavy reliance in the court below on what they character-

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[4] The authorities cited by respondents are not to the contrary. In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), the relevant question had neither been pressed *nor* passed upon below. *Id.* at 147 n.2 ("petitioner never raised any issue concerning the 1875 statute before the Court of Appeals" and "the Second Circuit did not rule on these contentions"). Similarly, there is no indication in *Auer v. Robbins*, 117 S. Ct. 905, 912 (1997), that the relevant question was passed upon below. Finally, *Illinois v. Gates*, 462 U.S. 213 (1983), is inapposite, as that case arose in the entirely different context of this Court's review of state court decisions. In that context, considerations of comity and limited jurisdiction -- considerations that are wholly absent here -- have generally led this Court to decline to consider questions not raised below. *Id.* at 217-22.

ized as the special "'twofold evidentiary burden' placed on an antitrust plaintiff" by *Laurel Sand & Gravel*. Resp. C.A. Br. 15; *see* note 1, *supra*. In any event, respondents' newly developed skepticism regarding the existence of a heightened proof standard is unfounded.

Respondents point to language in *Thompson Everett, Inc. v. National Cable Advertising, L.P.*, 57 F.3d 1317, 1322-23 (4th Cir. 1995), purporting to acknowledge that traditional summary judgment principles are applicable in antitrust cases as well. Br. in Opp. 9. But the *Thompson Everett* court went on to hold that the rules are in fact different in the antitrust context: "[T]he inferences which may be drawn vary from one substantive area of the law to another. Thus, on summary judgment motions *in antitrust cases*, . . . when there is evidence of conduct that is consistent with both legitimate competition and an illegal conspiracy, courts may not infer that an illegal conspiracy has occurred without other evidence." 57 F.3d at 1323 (emphasis added); *accord* Pet. App. 4a.

There can be no doubt that this rule of law -- which is expressly limited to the antitrust context -- amounts to a heightened proof requirement. As the Ninth Circuit has cogently observed, a rule "suggesting that a district court may grant summary judgment to antitrust defendants whenever the court concludes that inferences of conspiracy and inferences of innocent conduct are equally plausible . . . . would lead to a dramatic judicial encroachment on the province of the jury," effectively abolishing "traditional summary judgment rules in the antitrust context . . . and replac[ing] them with an entirely different set." *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 438 (9th Cir. 1990). For precisely that reason, the Ninth Circuit has refused to read *Matsushita* in the sweeping fashion adopted below. The Fourth Circuit, however, continues to adhere to its contrary approach. *See* Pet. 12-13; Pet. App. 4a.

In no other area of the law is a plaintiff's lawsuit subject to dismissal on summary judgment unless the plaintiff

"bring[s] forward evidence that *excludes the possibility*" that the defendants acted properly. Pet. App. 4a. The Fourth Circuit has repeatedly imposed that requirement on plaintiffs in antitrust conspiracy cases, including Grinnell in this case. That ongoing practice should not escape the attention of this Court.

2. Respondents halfheartedly contend (Br. in Opp. 11-13 n.2) that the circuits are not divided over the propriety of the heightened proof requirement applied by the court below. Glossing over the fact that at least one court of appeals has expressly recognized, and intentionally exacerbated, the existence of this circuit conflict (*see Corner Pocket of Sioux Falls, Inc. v. Video Lottery Tech., Inc.*, 123 F.3d 1107, 1109 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1054 (1998)), respondents blithely contend that the federal appellate courts have in fact been "remarkably uniform" in their treatment of *Matsushita*. Br. in Opp. 13 n.2.

There is little that needs to be said in response to this contention. As amply demonstrated in the petition (Pet. 12-17), and as a review of the relevant cases will convincingly demonstrate, the courts of appeals continue to disagree over the most fundamental question concerning the summary judgment standard announced in *Matsushita*: Does the heightened skepticism of antitrust conspiracy claims enunciated in *Matsushita* apply across the board to all such claims -- as the Fourth, Seventh, and Eighth Circuits have held -- or are courts like the Third and Ninth Circuits instead correct in holding that *Matsushita*'s heightened standard is limited to unusual cases, unlike this one, in which the plaintiff's theory of liability is inherently implausible and/or potentially anticompetitive? That fundamental question can be answered only by this Court, and it should be answered in this case.

II. THE ERRONEOUS INTERPRETATION OF THE NONSTATUTORY LABOR EXEMPTION ADOPTED BY THE COURTS BELOW IS WORTHY OF REVIEW BY THIS COURT

Respondents assert (Br. in Opp. 14-15) that the decision below is not in conflict with *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), because the district court purported to apply the three-part test announced in *Mackey*. To the contrary, however, the decision below is directly inconsistent with *Mackey*. The first *Mackey* prong requires a showing that "the restraint on trade primarily affects only the parties *to the collective bargaining relationship*." 543 F.2d at 614 (emphasis added). The district court departed substantially from this prong by effectively eliminating the italicized phrase from its version of the test, instead asking only whether the defendants' agreement to withdraw targeting from non-members of the NFSA bargaining unit was exempt from liability because it "primarily affected the parties themselves." Pet. App. 32a. It is beyond dispute that the entities primarily affected by the agreement to withdraw job targeting (*i.e.*, Grinnell and other non-NFSA contractors) were not parties *to the collective bargaining relationship*, as they had explicitly refused to be represented by NFSA in that relationship. Thus, far from representing a fact-bound application of the *Mackey* test, the decision below actually reflects a substantial modification of that test. And in any event, respondents implicitly concede Grinnell's showing that the decision below also conflicts with *Sheet Metal Workers Local Union No. 54, AFL-CIO v. E.F. Etie Sheet Metal Co.*, 1 F.3d 1464, 1475 (5th Cir. 1993) (*see* Pet. 22), further demonstrating the necessity of this Court's review.[5]

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[5] There is no merit to respondents' implication (Br. in Opp. 15) that *Local Union 257, Int'l Bhd. of Elec. Workers v. Sebastian Elec.*, 121 F.3d 1180 (8th Cir. 1997), and *Phoenix Elec. Co. v. National Elec. Contractors Ass'n*, 81 F.3d 858 (9th Cir. 1996), reached the same result as the decision below. Neither of those

Respondents offer virtually no response to the merits of Grinnell's showing (Pet. 22-25) that the decision below is irreconcilable with *Amalgamated United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Instead, they fall back on the lower courts' erroneous application of the heightened summary judgment standard to conclude that the evidence was insufficient to support a finding of the requisite conspiracy. Br. in Opp. 16. As discussed above and in the petition, however, the latter determination is certworthy (and incorrect) in its own right, so it hardly provides a basis for denying review of the nonstatutory labor exemption issue. And respondents' silence in the face of Grinnell's legal arguments on this issue cannot hide the fact that the reasoning adopted below reflects a profound departure from the principles that have guided this Court's applications of the nonstatutory labor exemption. *Pennington* squarely holds that an agreement "to impose a certain wage scale on other bargaining units" falls outside the scope of the exemption (381 U.S. at 665), but the courts below reached precisely the opposite conclusion. The court of appeals has thus "decided an important federal question in a way that conflicts with relevant decisions of this Court," and certiorari is warranted. Sup. Ct. R. 10(c).

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cases involved a conspiracy to *withdraw* job targeting from nonmembers of the bargaining unit; instead, those cases involved challenges to the very *existence* of job targeting programs. It is one thing to hold, as these courts have done, that a job targeting program established between the parties to a collective bargaining agreement "primarily affects only the parties to the collective bargaining relationship"; it is quite another thing to hold that an agreement to *withdraw* targeting *only* from *non*-parties to the collective bargaining agreement falls into the same category.

III. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG THE AUTHORITIES REGARDING THE EXISTENCE OF A PREDATORY INTENT REQUIREMENT

Respondents do not, and cannot, challenge Grinnell's showing (Pet. 26-27) that numerous courts (including this Court) hold that predatory intent is not a necessary element of a claim asserted under Section 1 of the Sherman Act. Nor do respondents dispute the fact that the court below has nonetheless engrafted precisely such an element onto the Sherman Act in cases involving claims against labor unions who conspire with employers to limit competition. And finally, respondents implicitly concede (as they must) that this Court has instructed that antitrust claims arising out of non-exempt labor-management agreements (like the agreements at issue here) should be evaluated under the same legal principles applicable to antitrust cases generally. *See* Pet. 28 (citing cases).

These concessions speak volumes, for they compel the conclusion that review by this Court is necessary to address the glaring inconsistency created by the lower courts' disparate treatment of antitrust claims asserted against labor unions. If, as Grinnell has shown (and as respondents have conceded), Section 1 claims do not require proof of predatory intent, and claims against labor unions are to be treated the same as other antitrust claims once the labor exemption issue has been disposed of, it necessarily follows that the special predatory intent requirement imposed by the court below (and by a handful of other circuits) in *Pennington*-type cases is impossible to reconcile with basic principles of antitrust law as enunciated by this and other Courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

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